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COURT OF APPEALS
REPORTS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

FRANCES ATIAPPO, EMPLOYEE, PLAINTIFF

v.

GOREE LOGISTICS, INC., AND OWEN THOMAS, INC., EMPLOYER, NONINSURED,
DEFENDANTS AND THE NORTH CAROLINA INDUSTRIAL COMMISSION

v.

GOREE LOGISTICS, INC., AND OWEN THOMAS, INC., NONINSURED EMPLOYER, AND
MANDIEME DIOUF, INDIVIDUALLY, DEFENDANTS

No. COA14-977

Filed 17 March 2015

1. Workers' Compensation—transportation broker—trucking company without insurance—broker liable

The Industrial Commission had jurisdiction over Owen Thomas, Inc., a transportation broker, in a workers' compensation case where Sunny Ridge paid Owen Thomas to deliver its goods, Owen Thomas then hired Goree Logistics to perform the delivery, the injured driver worked for Goree, and Goree did not have workers' compensation insurance.

2. Workers' Compensation—transportation broker—no federal preemption

Owen Thomas, a transportation broker, was not exempt from a state workers' compensation provision due to federal preemption. There is no reason why a statute requiring financial responsibility as to workers' compensation should be considered a regulation of prices, routes, or services and the federal preemption established in 49 U.S.C. § 14501(c)(1) does not apply to N.C.G.S. § 97-19.1, which imposes liability upon those who employ persons or entities that fail to procure required workers' compensation insurance.

ATIAPO v. GOREE LOGISTICS, INC.

[240 N.C. App. 1 (2015)]

3. Workers' Compensation—interstate trucking company—not exempt from workers' liability

A trucking company and an individual were not exempt from liability for not carrying workers' compensation insurance where they argued that the statute mentioned contractors and subcontractors but not employers.

Appeal by defendants from opinion and award entered 20 June 2014 by Commissioner Tammy Nance in the North Carolina Industrial Commission. Heard in the Court of Appeals 4 February 2015.

Grandy & Martin, P.A., by Kenneth C. Martin, for plaintiff-appellee Frances Atiapo.

Lawrence P. Margolis for defendants-appellants Goree Logistics, Inc. and Mandieme Diouf.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, PLLC, by John F. Scarbrough, for defendant-appellant Owen Thomas, Inc.

STEELMAN, Judge.

Where the evidence supported a finding that Owen Thomas was a general contractor, the Industrial Commission did not err in holding Owen Thomas liable as a statutory employer pursuant to N.C. Gen. Stat. § 97-19.1. Where an employer failed to carry workers' compensation insurance, the Industrial Commission did not err in imposing penalties upon the employer and its principal.

I. Factual and Procedural Background

On 22 June 2011, Owen Thomas, Inc. (Owen Thomas), a licensed transportation broker, entered into a "Broker-Carrier Agreement" with Goree Logistics, Inc. (Goree). Owen Thomas was acting on behalf of its client, Sunny Ridge Farms (Sunny Ridge), to procure transportation for Sunny Ridge's goods. The agreement provided that Goree would exercise full control over the work it performed in transporting the goods, and that Goree would assume responsibility for payment of all taxes, unemployment, and workers' compensation, and other related fees.

Frances Atiapo (plaintiff) drove a tractor trailer for Goree, and was directed to drive a tractor trailer transporting Sunny Ridge's goods. At the time of plaintiff's injury, Goree did not have workers' compensation insurance.

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[240 N.C. App. 1 (2015)]

Plaintiff was instructed to deliver the goods to Wyoming. When the goods were rejected, plaintiff was directed by Goree to drive the truck to Georgia. Plaintiff was later directed by Goree to go to Colorado. Near Ft. Collins, Colorado, plaintiff crested the peak of a hill, and came upon a string of stopped vehicles. His brakes failed and the tractor trailer collided with another vehicle. As a result of the collision, plaintiff sustained injuries.

On 29 July 2011, plaintiff filed an IC Form 18 notice of accident. On 19 September 2011, plaintiff filed a Form 33 request for hearing on his workers' compensation claim. On 28 September 2011, Goree filed a Form 61 denial of plaintiff's claim, contending that plaintiff was not an employee of Goree, but an independent contractor, and that Goree had only two persons driving trucks for it.

Following a hearing before the deputy commissioner, Owen Thomas was added as a party defendant to this proceeding.

On 14 April 2014, the Industrial Commission filed its Opinion and Award. The Commission found, despite the presence of a written agreement between plaintiff and Goree stating that plaintiff was an independent contractor, that for purposes of Chapter 97 of the North Carolina General Statutes, plaintiff was an employee of Goree. It further found that Goree had no workers' compensation insurance. Because Goree did not regularly employ three or more employees, the Commission did not assess penalties pursuant to N.C. Gen. Stat. § 97-94. Based upon its findings of fact, the Commission concluded that Owen Thomas was a "principal contractor within the meaning of N.C. Gen. Stat. § 97-19.1(a)" and ordered that Owen Thomas pay to plaintiff temporary total disability compensation, all of plaintiff's medical expenses arising from his injury by accident, and the costs of the hearing.

On 23 April 2014, the Attorney General filed a motion for reconsideration, asserting that under the provisions of N.C. Gen. Stat. § 97-19.1(a), a "contractor, intermediate contractor, or subcontractor" contracting in the interstate or intrastate carrier industry and operating a tractor trailer licensed by the United States Department of Transportation is required to carry workers' compensation insurance, "irrespective of whether such contractor regularly employs three or more employees[.]" N.C. Gen. Stat. § 97-19(a) (2013). Therefore, it was argued that Goree and its principal, Mandieme Diouf (Diouf), were subject to penalties under § 97-94 for failure to procure workers' compensation insurance.

On 20 June 2014, the Industrial Commission filed an Amended Opinion and Award, assessing penalties of \$8,800 against Goree, and \$78,868.63 against Goree's principal, Diouf.

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On 3 July 2014, Owen Thomas served notice of appeal from the Amended Opinion and Award. On 23 July 2014, Goree and Diouf served notice of appeal from the Amended Opinion and Award.

II. Standard of Review

“Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact.” *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006). However, the Commission’s “findings of jurisdictional facts are not conclusive on appeal even if they are supported by competent evidence;” instead, “a reviewing court must consider all the evidence in the record and make an independent determination of the jurisdictional facts.” *Cain v. Guyton*, 79 N.C. App. 696, 698, 340 S.E.2d 501, 503, *aff’d per curiam*, 318 N.C. 410, 348 S.E.2d 595 (1986).

III. Appeal of Owen Thomas – Jurisdiction

[1] In its sole argument on appeal, Owen Thomas contends that the Industrial Commission lacked jurisdiction over it. We disagree.

A. N.C. Gen. Stat. § 97-19.1

In its findings of fact, the Commission recognized that Owen Thomas “is a federally licensed ‘freight broker’ authorized by its customers to negotiate and arrange for the transportation of shipments in interstate commerce.” The Commission concluded that plaintiff was an employee of Goree. The Commission then further concluded that “the use of the word ‘broker’ is a distinction without a difference.” It noted that Owen Thomas was able to use its own judgment in selecting a carrier for its client, and that it retained a portion of what it received for the contract. It therefore concluded that Owen Thomas was a principal contractor. Because Owen Thomas was a principal contractor, and because Goree did not carry workers’ compensation insurance, the trial court held Owen Thomas liable to plaintiff pursuant to N.C. Gen. Stat. § 97-19.1.

N.C. Gen. Stat. § 97-19.1 provides, in relevant part:

Any principal contractor, intermediate contractor, or sub-contractor, irrespective of whether such contractor regularly employs three or more employees, who contracts with an individual in the interstate or intrastate carrier industry who operates a truck, tractor, or truck tractor trailer licensed by the United States Department of

ATIAPO v. GOREE LOGISTICS, INC.

[240 N.C. App. 1 (2015)]

Transportation and who has not secured the payment of compensation in the manner provided for employers set forth in G.S. 97-93 for himself personally and for his employees and subcontractors, if any, shall be liable as an employer under this Article for the payment of compensation and other benefits on account of the injury or death of the independent contractor and his employees or subcontractors due to an accident arising out of and in the course of the performance of the work covered by such contract.

N.C. Gen. Stat. § 97-19.1(a) (2013). In order for Owen Thomas to be liable under this statute, it must be shown that (1) Owen Thomas was a principal contractor, and (2) the subcontractor did not have the proper insurance. In the instant case, there is no factual dispute that Goree did not have the required workers' compensation insurance coverage. The only question, then, is whether the Commission correctly found and held that Owen Thomas was a principal contractor.

Owen Thomas contracted with Sunny Ridge to ship its goods. Owen Thomas was to be paid by Sunny Ridge for this service and would retain any monies not paid to the trucking company it hired. It had discretion in selecting a carrier. Owen Thomas provided 1099 tax forms to Goree. Owen Thomas controlled not only the outcome of the task, namely the delivery of goods, but the method by which the task would be performed, including how frequently Goree would report to Owen Thomas, and specifications on the temperature that would be maintained during transport. Sunny Ridge paid Owen Thomas "for insuring a delivery[.]"

Sunny Ridge paid Owen Thomas to deliver its goods. Owen Thomas then hired Goree to perform the delivery. Owen Thomas provided Goree with 1099 tax forms for the money paid by Owen Thomas.

We hold that this evidence supports the Industrial Commission's determination that Owen Thomas acted as a contractor hired by Sunny Ridge for the purpose of ensuring delivery of Sunny Ridge's goods. This in turn supports a finding that Owen Thomas employed Goree, a subcontractor without workers' compensation insurance coverage, and is therefore liable to plaintiff under N.C. Gen. Stat. § 97-19.1.

This argument is without merit.

B. Federal Preemption

[2] Owen Thomas contends that it is exempt from N.C. Gen. Stat. § 97-19.1 due to federal preemption, and that federal law precludes states from regulating interstate commerce. Owen Thomas notes that

ATIAPO v. GOREE LOGISTICS, INC.

[240 N.C. App. 1 (2015)]

an exception to this rule exists in 49 U.S.C. § 14501(c), but contends that the statute creates an exception only for motor carriers.

49 U.S.C. § 14501(c)(1) provides that:

[A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a *price, route, or service* of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1) (2005) (emphasis added). An exception exists to this statute, which notes that this rule

shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to *minimum amounts of financial responsibility relating to insurance requirements* and self-insurance authorization[.]

49 U.S.C. § 14501(c)(2)(A) (emphasis added).

We note that Owen Thomas does not contend that North Carolina's workers' compensation insurance requirements constitute a "law related to a price, route, or service of any motor carrier." We see no reason why a statute requiring financial responsibility as to workers' compensation should be considered a regulation of prices, routes, or services. We further note that the exception enumerated in 49 U.S.C. § 14501(c)(2)(A) explicitly holds that the rule in § 14501(c)(1) does not apply to insurance requirements. We hold that the federal preemption established in 49 U.S.C. § 14501(c)(1) does not apply to N.C. Gen. Stat. § 97-19.1, which imposes liability upon those who employ persons or entities that fail to procure required workers' compensation insurance.

Owen Thomas contends nonetheless that the exception in 49 U.S.C. § 14501(c)(2)(A) does not apply, because while § 14501(c)(1) contains language including motor carriers and brokers, § 14501(c)(2)(A) contains language including only motor carriers. Owen Thomas contends that the exception does not apply to brokers.

ATIAPO v. GOREE LOGISTICS, INC.

[240 N.C. App. 1 (2015)]

In the instant case, however, Owen Thomas went beyond its role as broker and acted as a contractor. As stated in section III-A of this opinion, Owen Thomas was hired to insure shipment of Sunny Ridge's goods. Owen Thomas then employed Goree to perform its obligation. At this point, Owen Thomas was not a broker, but a general contractor who had contracted with a motor carrier. Owen Thomas was, in effect, a motor carrier, despite the fact that the company itself owned no vehicles. Even assuming *arguendo* that § 14501(c)(2)(A) did not create an exception for brokers, Owen Thomas was not acting as a broker at the time it did business with Goree, and therefore was subject to the exception, which allowed N.C. Gen. Stat. § 97-19.1 to apply.

This argument is without merit.

IV. Appeal of Goree and Diouf – Penalties

[3] In their sole argument on appeal, Goree and Diouf contend that the Full Commission erred in imposing penalties upon Goree and Diouf for failure to procure workers' compensation insurance. We disagree.

In its original Opinion and Award dated 20 April 2014, the Full Commission did not hold Goree or Diouf liable for statutory penalties pursuant to N.C. Gen. Stat. § 97-94, because Goree was not shown to regularly employ three or more employees. Thereafter, the Attorney General filed a motion for reconsideration. In its Amended Opinion and Award, the Full Commission imposed penalties against Goree and Diouf pursuant to N.C. Gen. Stat. § 97-94. On appeal, Goree and Diouf do not dispute the Commission's finding that plaintiff was an employee and not an independent contractor; rather, they contend that they are exempt from N.C. Gen. Stat. § 97-19.1, because they do not regularly employ three or more people, and because they are not a "principal contractor, intermediate contractor, or subcontractor[.]"

The Purpose of the Workers' Compensation Act "is not only to provide a swift and certain remedy to an injured workman, but also to insure a limited and determinate liability for employers." *Riley v. DeBaer*, 149 N.C. App. 520, 523, 562 S.E.2d 69, 70 *aff'd per curiam*, 356 N.C. 426, 571 S.E.2d 587 (2002) (quoting *Johnson v. First Union Corp.*, 131 N.C. App. 142, 144, 504 S.E.2d 808, 809-10 (1998)). The argument presented by Goree and Diouf, that they are exempt from liability because the statute mentions contractors and subcontractors, but not employers, is specious. N.C. Gen. Stat. § 97-11 specifically provides that "[n]othing in this Article shall be construed to relieve any employer or employee from penalty for failure or neglect to perform any statutory duty." N.C. Gen. Stat. § 97-11 (2013). We decline to construe the provisions of

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[240 N.C. App. 8 (2015)]

N.C. Gen. Stat. § 97-19.1 to relieve an employer and its principal from penalties for failure to perform the statutory duty of providing workers' compensation insurance for its workers.

We further note that, in the context of interstate or intrastate trucking, § 97-19.1 applies "irrespective of whether such contractor regularly employs three or more employees[.]" N.C. Gen. Stat. § 97-19.1. Goree and Diouf's contentions that they employ fewer than three employees is thus irrelevant; the provisions of § 97-19.1 apply. We hold that the Commission did not err in imposing penalties upon Goree and Diouf for failure to carry workers' compensation coverage.

This argument is without merit.

AFFIRMED.

Judges DIETZ and INMAN concur.

BROWN'S BUILDERS SUPPLY, INC., PLAINTIFF

v.

JOHN SCOTT JOHNSON AND ANGELA R. JOHNSON, JOINTLY AND SEVERALLY, DEFENDANTS

No. COA14-836

Filed 17 March 2015

1. Construction Claims—general contractor licensure—control over project and subcontractors

In an appeal from a judgment awarding plaintiff subcontractor damages and attorney fees, the Court of Appeals rejected defendants' argument that plaintiff's failure to hold a general contractor's license barred recovery. Plaintiff's work on defendants' kitchen remodel project was limited to selling and installing some hardware. Because plaintiff did not exercise control over defendants' project or other subcontractors, plaintiff was not subject to the licensure requirement for general contractors.

2. Attorney Fees—findings of fact—unjustifiable refusal to resolve out of court

In an appeal from a judgment awarding plaintiff subcontractor damages and attorney fees, the Court of Appeals rejected defendants' argument that the trial court abused its discretion by

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[240 N.C. App. 8 (2015)]

awarding attorney fees without first finding that defendants unjustifiably refused to resolve the matter out of court. The trial court's order contained such a finding.

3. Attorney Fees—findings of fact—skill, rate, and experience

In an appeal from a judgment awarding plaintiff subcontractor damages and attorney fees, the Court of Appeals reversed and remanded the portion of the trial court's judgment awarding attorney fees. The trial court's order failed to include the necessary findings of fact regarding the skill required for the services rendered, the customary rate for such work in the area, and the experience or ability of plaintiff's attorney.

Appeal by Defendants from judgment entered 13 December 2013 by Judge Paul C. Ridgeway in Durham County Superior Court. Heard in the Court of Appeals 3 December 2014.

Vann Attorneys, PLLC, by Joseph A. Davies and James R. Vann, for the Plaintiff-Appellee.

Law Office of Robert B. Jervis, P.C., by Robert B. Jervis, for the Defendant-Appellants.

DILLON, Judge.

John S. Johnson and his wife, Angela R. Johnson ("Defendants"), appeal from a judgment awarding Brown's Builders Supply ("Plaintiff") damages and attorneys' fees. We affirm in part and reverse and remand in part.

I. Background

The evidence at trial tended to show the following: Defendants engaged Jimmy Allen as a general contractor to remodel their home. Mr. Allen contacted Plaintiff to perform certain work involved in the remodel of the kitchen area of the home. To save on the expense of management, Defendants retained Mr. Allen at an hourly rate and paid individual subcontractors on the project directly, including Plaintiff.

Plaintiff supplied Defendants with a wooden hood to sit atop their stove and installed it for them. Defendants discovered that the wooden hood had been seriously damaged sometime after its installation and requested that Plaintiff install a new one, free of charge. Plaintiff refused, contending that it was not responsible for damages caused either

BROWN'S BUILDERS SUPPLY, INC. v. JOHNSON

[240 N.C. App. 8 (2015)]

by other subcontractors or by environmental conditions such as heat and humidity.

Plaintiff thereafter demanded payment and threatened to sue for the amount due and outstanding on Defendants' account, notifying Defendants of its intention to seek costs, interest, and attorneys' fees if timely payment was not received. Plaintiff also claimed a lien on Defendants' real property to secure payment.

Plaintiff filed suit in Durham County Superior Court when payment was not forthcoming, seeking damages for breach of contract or recovery in *quantum meruit* in the alternative. The matter came on for trial before Superior Court Judge Paul C. Ridgeway on 21 August 2013.

Following a two-day bench trial, the court entered judgment in favor of Plaintiff, awarding Plaintiff damages of \$17,737.66 plus interest at the legal rate from 9 May 2012 until paid in full for breach of contract, attorneys' fees of \$5,912.55, and costs of \$2,986.80. Defendants entered written notice of appeal.

II. Analysis

Defendants make two arguments on appeal, which we address in turn.

A. General Contractor Licensure Requirement

[1] Defendants first contend that the trial court erred in entering judgment in favor of Plaintiff because the price of Defendants' contract with Plaintiff exceeded \$30,000.00 and Plaintiff was not a licensed general contractor. Specifically, Defendants contend that Plaintiff's failure to hold a valid general contractor's license absolutely bars Plaintiff's recovery. We disagree.

N.C. Gen. Stat. § 87-1 (2011) defines "general contractor," in relevant part, as "[a] firm or corporation who . . . undertakes to . . . construct . . . any improvement or structure where the cost of the undertaking is thirty thousand dollars (\$30,000) or more[.]" Unlike subcontractors, general contractors must be licensed. *Vogel v. Reed Supply Co.*, 277 N.C. 119, 131-32, 177 S.E.2d 273, 281 (1970). The purpose of the licensure requirement "is to protect the public from incompetent builders." *Id.* at 130, 177 S.E.2d at 280. Accordingly, unlicensed general contractors are prohibited from recovering in contract or *quantum meruit*. *Reliable Properties, Inc. v. McAllister*, 77 N.C. App. 783, 785, 336 S.E.2d 108, 110 (1985).

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What distinguishes a general contractor from a subcontractor is “the degree of control to be exercised by the contractor over the construction of the *entire project*.” *Harrell v. Clarke*, 72 N.C. App. 516, 517, 325 S.E.2d 33, 35 (1985) (emphasis added). When the written agreement setting forth the terms of the parties’ relationship is in the record, we review its terms “to determine the degree of control exercised[.]” *Signature Development, LLC v. Sandler Commercial at Union, L.L.C.*, 207 N.C. App. 576, 584-90, 701 S.E.2d 300, 306-10 (2010). Without the benefit of the parties’ agreement in the record, we review the evidence at trial to determine whether a particular contractor exercised the requisite control to be considered a general contractor, thus becoming subject to the licensure requirement and corresponding prohibitions on recovery. *Spears v. Walker*, 75 N.C. App. 169, 171-72, 330 S.E.2d 38, 40 (1985).

In the present case, we do not believe the scant written evidence suggests that Plaintiff exercised more than minimal control over the remodel project. Defendants’ written agreement with Mr. Allen is not in the record. Evincing the terms of an agreement between Plaintiff and Defendants is a recital on one invoice and three sales orders, which states as follows:

All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involving extra cost will be executed upon written orders and billed as an additional cost. All agreements are contingent upon strikes, accidents, acts of God, or delays beyond our control. Purchaser to carry all necessary property or casualty insurance for the jobsite.

The invoice and sales orders also list the materials supplied to Defendants and the prices of those materials, briefly describing them.

Nor do we believe the other evidence indicated that Plaintiff exercised more than minimal control over the project. Instead, it tended to show that Plaintiff’s involvement in the remodel of Defendants’ home was limited to the sale and installation of kitchen cabinets, several countertops, a wooden hood to sit atop Defendants’ stove, and a sink. Plaintiff did not oversee, direct, or manage the work of the other subcontractors. Instead, the evidence indicated that it was Mr. Allen who oversaw the construction, ordered various building materials, and coordinated the work of the various subcontractors, including Plaintiff.

Based on this evidence, we believe the degree of control exercised by Plaintiff was minimal and concerned only certain aspects of the

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kitchen, not the *entire project*. Plaintiff was, therefore, not subject to the licensure requirement applicable to general contractors, nor the corresponding bars on recovery. Accordingly, Defendants' first argument is overruled.

B. Attorneys' Fees

[2] Defendants next challenge the trial court's award of attorneys' fees. First, Defendants contend that the court abused its discretion in awarding attorneys' fees without first finding, as required, that Defendants unjustifiably refused to resolve the matter out of court. We disagree.

We review an award of attorneys' fees for an abuse of discretion. *Terry's Floor Fashions, Inc. v. Crown General Contract'rs, Inc.*, 184 N.C. App. 1, 17, 645 S.E.2d 810, 820 (2007), *aff'd per curiam*, 362 N.C. 669, 669 S.E.2d 321 (2008).

N.C. Gen. Stat. § 44A-35 (2013) provides:

[T]he presiding judge may allow a reasonable attorneys' fee to the attorney representing the prevailing party. This attorneys' fee is to be taxed as part of the court costs and be payable by the losing party upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit[.]

"The statute does not mandate that the trial court award attorneys' fees, but instead places the award within the trial court's discretion." *Barrett Kays & Assocs., P.A. v. Colonial Bldg. Co., Inc.*, 129 N.C. App. 525, 530, 500 S.E.2d 108, 112 (1998).

Defendants' contention that the trial court abused its discretion in awarding attorneys' fees without finding that Defendants unjustifiably refused to resolve the matter out of court mischaracterizes the court's judgment. Specifically, the trial court found that there was "an outstanding balance due and owing to the Plaintiff from the Defendants"; that Plaintiff "caused a demand letter to be sent to the Defendants, which included notice . . . that the Plaintiff would seek to recover attorneys' fees"; that "Plaintiff filed a claim of lien on Defendants' real property"; that "Plaintiff filed this action to enforce its lien rights"; and finally, that "Defendants' *refusal to resolve the lien [was] unreasonable*." (Emphasis added.) Not only did the court specifically find that there was "an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit," as statutorily required, *see* N.C. Gen. Stat. § 44A-35, "[t]hese findings of fact indicate, on their face, that the trial court's award of attorneys fees was the product of a reasoned

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decision[.]” *Terry’s Floor Fashions, Inc.*, 184 N.C. App. at 18, 645 S.E.2d at 821. Accordingly, Defendants’ first contention regarding the award of attorneys’ fees is overruled.

[3] Defendants next contend that the trial court’s award of attorneys’ fees must be reversed because the record does not contain the findings required to support the award. We agree.

“As a general rule, in the absence of some contractual obligation or statutory authority, attorney fees may not be recovered by the successful litigant as damages or a part of the court costs. . . . [However,] [b]y allowing the recovery of attorneys’ fees, N.C. Gen. Stat. § 44A–35 creates an exception to the general rule that attorneys’ fees are not recoverable.” *Martin & Loftis Clearing & Grading, Inc. v. Saieed Const. Systems Corp.*, 168 N.C. App. 542, 546, 608 S.E.2d 124, 127 (2005).

In an opinion affirmed *per curiam* by our Supreme Court, we held that an award of attorneys’ fees is only appropriate where the trial court makes “findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.”¹ *N.C. Dep’t of Corr. v. Myers*, 120 N.C. App. 437, 442, 462 S.E.2d 824, 828 (1995) (internal marks omitted), *aff’d per curiam*, 344 N.C. 626, 476 S.E.2d 364 (1996). Where a statute authorizes the award of only reasonable fees, these findings are necessary to support the reasonableness of the award. *Cobb v. Cobb*, 79 N.C. App. 592, 595–96, 339 S.E.2d 825, 828 (1986). Without these findings, the reviewing court is “effectively preclude[d] . . . from determining whether the trial court abused its discretion[.]” *Williamson v. Williamson*, 140 N.C. App. 362, 365, 536 S.E.2d 337, 339 (2000).

In the present case, the trial court found as follows:

The Plaintiff[s] attorney has expended 96.30 hours in pursuit of this matter, as well as 33.40 hours of paralegal time. Costs and expenses incurred by the Plaintiff were

1. In 1992, our Supreme Court seemingly approved an award of attorneys’ fees that apparently did not include express findings concerning the attorney’s skill and ability or the customary rate for similar work. *Dyer v. State*, 331 N.C. 374, 378, 416 S.E.2d 1, 3 (1992). However, *Dyer* predates our Supreme Court’s approval of our opinion in *Myers* by four years. Since *Myers*, this Court has required the trial court to make such or similar findings for virtually every type of attorneys’ fee award. See, e.g., *Simpson v. Simpson*, 209 N.C. App. 320, 324, 703 S.E.2d 890, 893 (2011) (award under N.C. Gen. Stat. § 50-13.6); *Dunn v. Canoy*, 180 N.C. App. 30, 49, 636 S.E.2d 243, 255 (2006) (award as a Rule 11 sanction); *Porterfield v. Goldkuhle*, 137 N.C. App. 376, 378, 528 S.E.2d 71, 73 (2000) (award under N.C. Gen. Stat. § 6-21.1); *Brockwood Unit Ownership Ass’n v. Delon*, 124 N.C. App. 446, 449–50, 477 S.E.2d 225, 227 (1996) (award under N.C. Gen. Stat. § 47C-4-117).

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\$2,986.80. The Court finds that reasonable attorney's fees in this matter are one-third of the amount recovered, namely \$5,912.55, and that Plaintiff should also be entitled to recover costs of this action in the amount of \$2,986.80.

While the affidavit for attorneys' fees and client ledger included in the record on appeal support this finding by the trial court, the court's finding omits any mention of (1) the skill required to provide the services rendered; (2) a customary rate for similar work in the area; or (3) the experience or ability of Plaintiff's attorney. Although our review of the record reveals evidence in support of these facts, the order itself does not contain these findings, as required. *See Myers*, 120 N.C. App. at 442, 462 S.E.2d at 828. Accordingly, we must reverse and remand for further findings. On remand, the trial court may but is not required to award attorneys' fees provided it determines that the evidence in support of the necessary findings is competent and the court makes those findings, as required.²

III. Conclusion

For the reasons stated herein, we affirm the portion of the trial court's judgment awarding Plaintiff damages and reverse and remand the portion awarding Plaintiff attorneys' fees, with instructions to the trial court to conduct further proceedings consistent with this opinion.

AFFIRMED in part and REVERSED AND REMANDED in part.

Judges BRYANT and DIETZ concur.

2. Relying on an affidavit from an officer of the court is appropriate in these circumstances. *See Dyer v. State*, 331 N.C. 374, 378, 416 S.E.2d 1, 3 (1992) (upholding award of attorneys' fees based on statements by attorney as to "the amount of time he devoted to the case").

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HARNETT COUNTY OBO CHELLE B. DE LA ROSA, PLAINTIFFS

v.

PATRICIO A. DE LA ROSA, DEFENDANT

No. COA14-775

Filed 17 March 2015

1. Appeal and Error—child support order—no certificate of service

The Court of Appeals had jurisdiction to consider the father's appeal in an action for child support and equitable distribution. No certificate of service for the child support order was filed, and therefore father's time for appeal was tolled.

2. Child Custody and Support—support order—treated as permanent

A 2011 order was a permanent order for child support because, although it was entered without prejudice, no review hearing was set and all of the parties and the trial court treated the order as permanent. Because it was a permanent child support order, the burden of proof to show a substantial change in circumstances would be on the father for his motion to modify the order and on the County on the motion to show arrears.

3. Child Custody and Support—imputed income to father—increased debt—lack of effort to earn

The trial court did not abuse its discretion by finding that a father showed a deliberate disregard of his responsibility to support his children, given his increased debt and lack of effort recently to earn an income. The trial court's "deliberate disregard" finding of fact supported the trial court's determination to impute income.

4. Child Custody and Support—imputed income—father's expenses—paid by his parents

The trial court abused its discretion in the manner in which it imputed income to the father in a child support action by relying solely upon the father's parents' expenditures for the father's living expenses to impute income. While in some cases monthly expenditures may be a reasonable way to assist the trial court in determining an imputed income amount, in this case, father was not paying those expenses.

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5. Child Custody and Support—arrears—determination of amount—not based on evidence

The trial court's determination of the amount of child support arrears and a payment schedule were reversed where the findings of fact regarding arrears were not based upon any evidence and the appellate court could not determine how the arrears were calculated or from what date the trial court made a child support modification effective.

Appeal by defendant from order entered 28 February 2014 by Judge Mary H. Wells in District Court, Harnett County. Heard in the Court of Appeals 18 November 2014.

No plaintiff-appellee brief filed.

Elizabeth Myrick Boone, for defendant-appellant.

STROUD, Judge.

Patricio De la Rosa appeals order awarding child support arrears to mother Chelle De la Rosa. For the following reasons, we reverse.

I. Background

On 13 December 2011, father Patricio De la Rosa (“Father”) filed a complaint for custody and child support, divorce from bed and board, and equitable distribution. On 13 April 2011, mother Chelle De la Rosa (“Mother”) answered the complaint and counterclaimed for custody and child support, divorce from bed and board, equitable distribution, and alimony and post-separation support. On 26 September 2011, the trial court entered an order granting the parties “joint legal custody with [Mother] having primary physical custody and [Father] having secondary custody in the form of visitation” and requiring Father to pay Mother

\$1,878.00 per month as temporary child support beginning August 1, 2011, and [Father] shall establish an allotment or other direct pay to ensure this payment is made. Once begun, he shall take no steps to modify it without a court order. In the event the employment status of either party changes, either party may motion the court to modify the same.

The 2011 order also provided that “[t]his is a temporary, non-prejudicial order that does not preclude either party from presenting any evidence

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they now could, or hereinafter acquire at any further hearings in this matter.”

- On 31 August 2012, Father filed a motion to modify child support, which was still \$1,878.00 per month. In his motion Father alleged “a substantial change of material circumstances affecting the welfare of the minor children[,]” including his discharge from the United States Army on 19 June 2012, his subsequent lack of employment, and his travel expenses to visit the children. Mother filed no response to Father’s motion, but on 23 October 2012, Harnett County Child Support Services (“Harnett County”) filed a motion to intervene as defendant in this case, a motion to redirect child support payments to the North Carolina Child Support Centralized Collections, a motion to sever the issue of child support from the other issues in the case, and a motion to establish arrears and set up a payment plan for the arrears.

On 13 March 2013, the trial court entered an “ORDER TO INTERVENE AND REDIRECT PAYMENTS” which granted all of Harnett County’s motions and also addressed Father’s motion to modify child support.¹ As to the motion to modify, the trial court found:

There has been a change of circumstances since the entry of the Order referred to above which materially affects the welfare of the minor children to wit: [Father] is currently unemployed having been discharged from the US Army without benefits and his motion to modify should be allowed.

The trial court ordered Father to pay \$222 a month in child support beginning that month as “a temporary, non[-]prejudicial amount” and stated that retroactive child support would be determined “at a later date.”² [H]owever[,] it is admitted that there is an arrearage amount and

1. While Father was initially the plaintiff in this action, upon the entry of the 2013 order and thereafter, he is listed as the defendant. The plaintiff from the 2013 order and thereafter is Harnett County on behalf of Chelle De la Rosa.

2. The 2013 order appears to be signed at the bottom by plaintiff, defendant, and defendant’s attorney, indicating it was entered by consent. An employee for Harnett County also testified at the later 23 September 2013 review hearing that the amount of \$222.00 per month in child support was entered into by consent.

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that the [Father] shall begin payments on this amount, the amount total to be determined” but that payment should currently be “100.00 per month, until paid in full.” The trial court then set a review hearing for 24 June 2013 and decreed that “[t]his is a temporary, non-prejudicial order[.]”

On 23 September 2013, the trial court held a review hearing. At the beginning of the hearing, Harnett County’s attorney noted that there were issues of “ongoing support and that of arrears.” On 28 February 2014, the trial court entered an order finding:

1. This is an action on . . . [Harnett County]’s Motion to Add Pay Frequency on Arrears.
2. There is an ongoing support order requiring [Father] to pay \$222.00 per month for child support.
3. [Mother] and [Father] are physically and mentally capable of earning an income.
4. [Mother] is voluntarily unemployed.
5. [Mother] was voluntarily unemployed during the summer of 2013.
6. [Father]’s last known employment was as a Major in the U.S. Military where he earned approximately \$6000.00 per month.
7. [Father] has not served in the U.S. military since June 19, 2012.
8. No evidence or testimony regarding [Father]’s separation from the military was presented.
9. [Father] secured a \$250,000.00 line of credit to purchase an ice cream franchise during the summer of 2013.
10. [Father] has used \$30,000.00 from the line of credit to purchase the ice cream franchise.
11. [Father] failed to provide any documentation detailing the terms of the line of credit; amounts withdrawn; or balance remaining under [Father]’s control.
12. [Father] failed to provide any documentation detailing his business plan for the ice cream franchise.
13. [Father] failed to provide suitable documentation of past or current income.

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14. [Father] failed to provide his most recent tax return.
15. The ice cream franchise is not open. [Father] is not earning an income from the franchise as of this date.
16. [Father] did not consider his ability to meet his child support obligation when he chose to increase his debt by securing the \$250,000.00 line of credit.
17. [Father] [has] shown no intention of obtaining gainful employment pending the anticipated income from the ice cream franchise, even though he will be unable to support himself or his children in his current situation.
18. [Father]'s minimal monthly income expenses are:

rent -	\$ 1200.00
lights/utilities	\$ 120.00
internet	\$ 50.00
motorcycle	\$ 236.00
water -	\$ 80.00
cell phone	\$ 50.00
cable	\$ 50.00
Ford Expedition	\$ 600.00
19. [Father]'s disposable income is unknown.
20. [Father]'s actions to substantially increase his debt and his failure to show any attempt to immediately earn an income is willful and shows a deliberate disregard of his responsibility to support his children.
21. [Father]'s probable earning level equals the amount of [sic] which he is actually living, based on the amount [Father] spends monthly on expenses.
22. [Father]'s child support obligation is to be calculated pursuant to the North Carolina Child Support Guidelines with [Father] earning \$2,436.00 per month.
23. That pursuant to the North Carolina Guidelines, [Father]'s child support obligation is \$774.00 per month.
24. That [Father] did not make child support payments to [Mother] from July, 2012 through December, 2012.
25. That for the months of January and February, 2013, [Father] did not make payments.

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26. That from March until February, 2014, [Father] paid support to [Mother] in the sum of \$222.00 per month.

27. That the parties previously agreed in the order dated 3/11, 2013, that the issue of arrears would be addressed[.]

2[8]. [Father] has the ability to comply with the orders of this court.

The trial court then ordered:

1. Arrears as of the date of February, 2014, are 7,728.00 owed to the [Mother]. The [Father] failed to make any payments for six months in 2012.
2. The [Father] shall pay \$77.00 towards the arrears beginning 3/1, 2013.
3. This cause is retained for further orders of this court.

Father appeals the 2014 order.

II. Jurisdiction to Consider Appeal

[1] Father's notice of appeal states, "The [Father] was never served with a copy of this order and no Certificate of Service is attached to this order." The record includes a certificate of service both for Father's notice of appeal and the proposed record, and this verifies that Harnett County was made aware of Father's assertion regarding a lack of service. Neither Harnett County nor Mother sought to amend or add to the record on appeal nor have they in any way challenged Father's proposed record, so it now serves as the record on appeal. *See* N.C.R. App. P. 11(b) ("If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.") Based upon the record, no certificate of service for the order was filed, and therefore Father's time for appeal was tolled. *See Rice v. Coholan*, 205 N.C. App. 103, 110-11, 695 S.E.2d 484, 489-90 (2010) ("Because there was no certificate of service filed, the time for filing the notice of appeal was tolled. Thus, Father's notice of appeal filed in Mecklenburg County on 17 September 2008 was timely. Our Court, therefore, has jurisdiction to hear this appeal.") Accordingly, we have jurisdiction to consider Father's appeal.

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II. Standard of Review

Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion. Under this standard of review, the trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. In a case for child support, the trial court must make specific findings and conclusions. The purpose of this requirement is to allow a reviewing court to determine from the record whether a judgment, and the legal conclusions which underlie it, represent a correct application of the law.

Loosvelt v. Brown, ___ N.C. App. ___, ___, 760 S.E.2d 351, 354-55 (2014) (citation and brackets omitted).

III. Findings of Fact

[2] Father challenges over half of the findings of fact on appeal. Rather than addressing each challenged finding of fact separately we will consider the contested findings of fact within each of the other arguments raised by Father. Before we can consider the findings of fact, we must first determine exactly what issues were before the trial court and what issues the order addressed. Despite the fact that Father called his 31 August 2012 motion a "MOTION TO MODIFY CHILD SUPPORT" and alleged a substantial change of circumstances, the prior 2011 order, purported to be temporary and non-prejudicial and as such Father would not need to demonstrate a substantial change of circumstances in order to modify the 2011 order. *See LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 914-15 (2002) ("If a child custody order is final, a party moving for its modification must first show a substantial change of circumstances. If a child custody order is temporary in nature and the matter is again set for hearing, the trial court is to determine custody using the best interests of the child test without requiring either party to show a substantial change of circumstances." (citation and footnote omitted)).

However, in *LaValley*, this Court clarified:

In this case, the Order was entered without prejudice to either party. It did not set any date for a court hearing on the custody issue, and the matter was not set before the trial court until almost two years later when

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the Motion was filed. The inclusion of the language without prejudice is sufficient to support a determination the Order was temporary. It was, however, converted into a final order when neither party requested the calendaring of the matter for a hearing within a reasonable time after the entry of the Order.

Accordingly, the trial court, in determining the issue of custody, was required to review the Motion under a substantial change of circumstances test.

151 N.C. App. at 292-93, 564 S.E.2d at 915 (quotation marks, brackets, and footnotes omitted). Though *LaValley* was addressing child custody, we find its logic instructive. *See id.*

Here, as in *LaValley*, although the 2011 order was entered without prejudice it did not set a future hearing date to determine permanent child support. *See id.* at 293, 564 S.E.2d at 915. While in *LaValley* “almost two years” went by before a motion was filed regarding child support, *id.*, here, Father filed his motion within approximately eleven months of the entry of the 2011 order. Our Court pointed out in *LaValley*, “[w]hether a request for the calendaring of the matter is done within a reasonable period of time must be addressed on a case-by-case basis. In this case, we simply hold that twenty-three months is not reasonable.” *Id.* at 293 n.6, 564 S.E.2d at 915 n.6. In this case, although not even a year had passed, Father himself treated the temporary 2011 order as a permanent order by filing a motion alleging “a substantial change of circumstances” and requesting modification of child support based upon these circumstances. Thereafter, in its 2013 consent order, the parties and trial court also treated the 2011 order as a permanent order by stating that Father’s “motion to modify should be allowed” because “[t]here has been a substantial change of circumstances[.]” this standard is required to modify permanent, not temporary, support orders. *See id.* at 292, 564 S.E.2d at 915. No party suggested at the hearing that the prior orders were temporary and non-prejudicial nor has Father argued before this Court that the trial court should have considered his motion as an initial determination of permanent child support. Thus, in considering this on a “case-by-case basis[.]” *id.* at 293 n.6, 564 S.E.2d at 915 n.6, here, as no review hearing was set in the 2011 order and all of the parties and the trial court treated the 2011 order as a permanent order for child support, we conclude that the 2011 order was indeed a permanent child support order, so the burden of proof to show a substantial change in circumstances would be on Father for his motion to modify a permanent

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child support order. *See id.* at 292, 564 S.E.2d at 915; *see generally Banks v. Shepard*, 230 N.C. 86, 91, 52 S.E.2d 215, 218 (1949) (“Burden of proof means the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause.” (citation and quotation marks omitted)).

Our Courts have recognized that child support modification is “a two-step process.” *McGee v. McGee*, 118 N.C. App. 19, 26, 453 S.E.2d 531, 536, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995). “The court must first determine a substantial change of circumstances has taken place; only then does it proceed to apply the Guidelines to calculate the applicable amount of support.” *Id.* at 26-27, 453 S.E.2d at 536. The trial court took the first step, determination of a substantial change of circumstances, in the 2013 consent order. Accordingly, the only issues left for the trial court to determine in the 2014 order being appealed were the amount of the modification and arrears. As to the modification, the burden of proof was upon Father as the movant on the motion to modify, and as to the establishment of arrears, the burden of proof was upon Harnett County, as the movant on the motion to establish arrears. *See generally Banks*, 230 N.C. at 91, 52 S.E.2d at 218.

IV. Imputing Income

[3] Father contends that “the trial court erred in imputing income to . . . [him] and in calculating his child support obligation under the guidelines using this imputed income amount.” Father argues that

in order to impute income, the trial court must make findings of fact that the parent is voluntarily unemployed or underemployed and that such voluntarily [(sic)] unemployment or underemployment is the result of the parents bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation. No such findings were made in this action[.]

(Citation and quotation marks omitted.)

As a general rule, “a party’s ability to pay child support is determined by that party’s actual income at the time the award is made.” *Respass v. Respass*, ___ N.C. App. ___, ___, 754 S.E.2d 691, 704 (2014). But child support may be based upon earning capacity

where the party deliberately acted in disregard of his obligation to provide support. Before earning capacity may be used as the basis of an award, there must be a showing that the actions reducing the party’s income were taken

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in bad faith to avoid family responsibilities. This showing may be met by a sufficient degree of indifference to the needs of a parent's children.

Id. (citation, quotation marks, ellipses, and brackets omitted).

Before the trial court may impute income, it “must find a deliberate depression of income or other bad faith[.]” *Ludlam v. Miller*, ___ N.C. App. ___, ___, 739 S.E.2d 555, 560 (2013) (citations and quotation marks omitted). The Child Support Guidelines do not allow the trial court to choose “a method of imputing income based upon the degree of bad faith found by the trial court[;]” that is, the court may not impute a higher income based on a “higher degree of bad faith[.]” *Id.* If the trial court determines that a party has deliberately depressed income or otherwise acted in bad faith, it may then decide how to impute income, but the imputed income still must be based upon

the parent's employment potential and probable earnings level based on the parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community. If the parent has no recent work history or vocational training, potential income should not be less than the minimum hourly wage for a 40-hour work week.

Id. (quoting N.C. Child Support Guidelines effective at the time of this case).

Here, the trial court found that “[Father]’s actions to substantially increase his debt and his failure to show any attempt to immediately earn an income is willful and shows a deliberate disregard of his responsibility to support his children.” Father testified that he had opened a \$250,000 line of credit and already used \$30,000 of it to buy an ice cream franchise; thus, there was evidence that Father “substantially increase[d] his debt[.]” Furthermore, Father testified that his previous attempts to find employment had been unsuccessful and that he had stopped searching for employment, which is evidence of “willful[ness]” or voluntariness and a “failure to show any attempt to *immediately* earn an income[.]” (Emphasis added.) Although a full reading of the transcript might support a determination that Father was in the process of opening his ice cream franchise in a timely manner in order to earn income, we cannot say, given Father's increased debt and lack of effort recently to earn an income, that the trial court abused its discretion in finding that Father “show[ed] a deliberate disregard of his responsibility to support his children.” The trial court's “deliberate disregard” finding of fact supports

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the trial court's determination to impute income. *See id.* We now turn to the trial court's method of imputation of income to Father.

[4] Imputed income should be determined based upon "the parent's employment potential and probable earnings level based on the parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community[.]" *id.*, but here the trial court instead based it upon "the amount of [(sic)] which he is actually living, based on the amount Father spends monthly on expenses." The evidence showed that Father's parents were paying his living expenses. While in some cases monthly expenditures may be a reasonable way to assist the trial court in determining an imputed income amount, in this case, Father was not paying those expenses. Father's reliance upon his parents for his own support may be further evidence of his bad faith in failing to find employment, but it does not provide any information about Father's earning capacity. Father may have a much greater or lesser capacity to earn income than what his parents are willing or able to pay. In relying solely upon the Father's parents' expenditures for Father's living expenses to impute income, the trial court abused its discretion in the manner in which it imputed income to Father.

In some cases, we may remand a case to the trial court to make additional findings of fact based upon the evidence presented, but here, the lack of findings is due to the lack of evidence itself. Father has not worked since 2012, and therefore he has no "work history" within approximately the past two years. *Id.* There was no evidence of Father's "occupational qualifications[.]" *id.*, other than that he had served in the military. There was no evidence about how his military service may have prepared him for any type of work outside of the military since there was no mention of what type of work he actually did. The record is also devoid of evidence regarding Father's education, work history prior to his military service or "prevailing job opportunities and earning levels in the community[.]" *Id.* On remand, the trial court would have no reasonable basis upon which to determine an imputed income amount because there was no evidence of Father's "recent work history, occupational qualifications [or] prevailing job opportunities and earning levels in the community." *Id.* We therefore reverse the trial court's imputation of income and the amount of child support set based upon the trial court's imputation of income.

V. Child Support Arrears

[5] Father next contends that "the trial court erred in awarding retro-active child support arrears in that such award is not supported by the

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evidence, findings of fact or conclusions of law.” The record and the full transcript of the hearing shows that there was no evidence presented to the trial court regarding arrears. One attorney made an introductory statement to the trial court mentioning arrears in a general sense but no evidence was presented regarding any payments Father had made or how much child support would have been owed.³ We cannot determine how the arrears were calculated or from what date the trial court made the child support modification effective. Since the 2011 order had become a permanent order, Father filed his motion for modification on 31 August 2012, and the 2013 consent order determined that he was entitled to modification without determining the amount of ongoing support or arrears, it appears that the modification probably extended as far back as 1 September 2012, but neither the record, transcript, or brief sheds any light on the actual time period of the arrearage calculation. The findings of fact regarding arrears are not based upon any evidence and are therefore erroneous; thus, the trial court’s determination of the arrears amount and payment schedule must be reversed.⁴

VI. Conclusion

For the foregoing reasons, we reverse the order of the trial court.

REVERSED.

Judges CALABRIA and McCULLOUGH concur.

3. We realize that the 2013 consent order stated that the amount of arrears were to be determined at a later date, so there had likely been some discussion among the parties and trial court about amounts paid and perhaps some documentation of child support payments. But our record does not include any evidence regarding either parent’s financial state, and if this information was known to the trial court, it was not mentioned or presented as evidence during the hearing by either testimony or documentary exhibit.

4. An additional problem is that the trial court determined that defendant’s “child support obligation is \$774.00 per month[,]” but the trial court did not *decree* that defendant pay any ongoing child support nor did the trial court set a date for payment of monthly child support. The decretal portion of the 2014 order states only that the arrears as of February 2014 were \$7,728.00 and that defendant “shall pay \$77.00 towards the arrears beginning 3/1, 2013.” Thus, the 2014 order by its decree neither requires any payment of ongoing monthly child support nor monthly payments toward arrears. As we must reverse, we note these additional errors so that any future orders entered in this action may set out in detail an ongoing child support payment schedule and a payment schedule for the arrears.

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[240 N.C. App. 27 (2015)]

JORDAN HEBENSTREIT, PLAINTIFF

v.

RACHEL HEBENSTREIT, DEFENDANT

No. COA14-1025

Filed 17 March 2015

**Contempt—first motion—involuntary dismissal—second motion
—new issues**

The trial court erred by ruling that plaintiff's second motion for contempt was not properly before the court after a first that had been dismissed. The second motion raised issues not raised in the first.

Appeal by plaintiff from order entered 20 May 2014 by Judge Louis F. Foy, Jr. in Onslow County District Court. Heard in the Court of Appeals 3 February 2015.

Ferrier Law, P.L.L.C., by Kimberly M. Ferrier, for plaintiff.

Lana S. Warlick, for defendant.

TYSON, Judge.

Plaintiff appeals from the trial court's order, which ruled his motion for contempt had previously been adjudicated, was not properly before the court, and which dismissed his motion. We reverse and remand.

I. Background

The parties were married in 2010 and separated in July of 2012. One child was born of the marriage. On 14 August 2013, the district court granted plaintiff an absolute divorce from defendant. With consent of the parties, the court also awarded the parties joint legal custody of the minor child. Defendant-mother was awarded primary physical custody. Plaintiff-father was awarded secondary physical custody and liberal visitation privileges.

The custody order sets forth plaintiff's visitation schedule with the child. The court awarded plaintiff visitation every other weekend, and recited a schedule for visitation on holidays. On 9 September 2013, less than a month after entry of the custody order, plaintiff filed a motion for contempt. Plaintiff alleged defendant absconded with the child to

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Texas without plaintiff's permission, remained there for six weeks, and refused to return the child to North Carolina. Plaintiff also sought modification of the 14 August 2013 custody order to award primary custody of the child to him.

Plaintiff's attorney calendared the motion for contempt. The case appeared on the district court calendar on 30 September 2013, before the Honorable Anne B. Salisbury. When the matter was called for hearing, neither plaintiff nor plaintiff's attorney were present. Defendant's attorney, Lana S. Warlick, Esq., appeared on behalf of defendant. The record shows Ms. Warlick filed a notice of appearance on 1 July 2013 and represented defendant at the custody hearing.

Plaintiff's counsel represented to the court that she contacted Ms. Warlick's office when she filed the motion for contempt and was informed that Ms. Warlick no longer represented defendant. Ms. Warlick was retained for purposes of the contempt hearing subsequent to plaintiff's filing of the contempt motion. Plaintiff's attorney stated she was unaware that defendant was represented by counsel on the day of the hearing.

Defendant's attorney did not move for dismissal and requested the court to continue the matter. The court dismissed, *sua sponte*, plaintiff's motion for contempt for failure to prosecute. The court also ordered the parties to attend custody mediation with regard to plaintiff's motion to modify the custody order.

Plaintiff filed a second motion for contempt on 7 October 2013. The motion alleges defendant had remained in Texas with the child, refused to return the child to North Carolina, and was collecting unemployment in Texas. Plaintiff's motion further alleged he had traveled to Texas to visit the child. Defendant continued to deny plaintiff access to the child, refused to return the child to North Carolina, and repeatedly stated she intended to remain in Texas.

Plaintiff's second motion for contempt was heard before the court on 28 October 2013, before the Honorable Louis F. Foy, Jr. Plaintiff's attorney explained to the court that the child was currently back in North Carolina, and that plaintiff sought an order to prevent defendant from taking and keeping the child out of state.

Plaintiff's attorney informed the court she was present in court in another county on the date Judge Salisbury dismissed plaintiff's first contempt motion. Plaintiff's counsel further explained she had recently established a law practice in Onslow County and understood she would

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receive notice of hearing of when the case was calendared. The court did not rule on the matter and held it open for further consideration.

The matter was held open until 20 May 2014. The court determined the 30 September 2013 dismissal of plaintiff's first motion for contempt was an adjudication of the merits of plaintiff's second motion for contempt. The court ruled that plaintiff's second motion for contempt, which it determined requested the same relief the trial court had ruled upon in the first motion for contempt, was not properly before the court. The court further ordered that plaintiff may file a motion for reconsideration of the ruling on the prior motion to be addressed by Judge Salisbury. Plaintiff appeals.

II. Issues

Plaintiff argues the trial court erred by: (1) finding that his 9 September 2013 motion and 7 October 2013 motion contained the same allegations and sought the same relief; (2) concluding Judge Salisbury's 30 September 2013 order dismissed her motion for contempt with prejudice; (3) failing to consider lesser sanctions; (4) failing to make proper findings of fact and conclusions of law; and, (5) requiring plaintiff to file a motion for reconsideration.

III. Plaintiff's Arguments on Appeal

Plaintiff argues issues related to the entry of Judge Salisbury's 30 September 2013 order. Plaintiff has not appealed from the 30 September 2013 order, and we do not address any arguments pertaining thereto. N.C.R. App. P. Rule 10(a) (2013). Plaintiff has only appealed from Judge Foy's 20 May 2014 order, in which he concluded the allegations of plaintiff's second motion for contempt were previously adjudicated on 30 September 2013.

We will only consider plaintiff's arguments and issues pertaining to the 20 May 2014 order, and specifically whether the court erred in concluding that it was precluded from ruling upon the merits of the case by Judge Salisbury's prior order.

IV. Adjudication of Plaintiff's Claims

Plaintiff argues the court erred by ruling his second motion for contempt was not properly before the court, because it contained the same allegations as the first motion for contempt, dismissed by Judge Salisbury on 30 September 2013. We agree.

On 9 September 2013, plaintiff filed his first motion for contempt and motion to modify child custody. Plaintiff alleged:

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6. The Defendant has willfully and without legal justification or excuse failed and refused to comply with the terms of the Judgment in that Defendant has failed to allow Plaintiff reasonable visitation with the minor child. Specifically, Defendant informed the Plaintiff that her grandmother was dying, but instead of taking the minor child for a few days, took the minor child for six weeks to Texas over the objection of the Plaintiff and without the Plaintiff's permission. Furthermore, Defendant is now refusing to return the minor child to the State of North Carolina upon Plaintiff's request.

This is the only allegation contained in the 9 September 2013 motion pertaining to contempt. Plaintiff alleged that a substantial and material change in circumstances occurred by defendant's departure from the State with the child, which completely denied plaintiff access to the child. Plaintiff sought an order to adjudicate defendant in willful civil contempt, and sought modification of his visitation with the child.

The court dismissed, *sua sponte*, plaintiff's first contempt motion and motion to modify child custody on 30 September 2013 for plaintiff's failure to prosecute. Neither plaintiff nor his counsel was present when the case was called for hearing. Defendant's counsel did not move for dismissal, but rather for a continuance.

On 7 October 2013, plaintiff filed a second contempt motion and alleged:

7. The Defendant has willfully and without legal justification or excuse failed and refused to comply with the terms of the Judgment in that Defendant has failed to allow Plaintiff reasonable visitation with the minor child. Specifically, Defendant informed the Plaintiff that her grandmother was dying, but instead of taking the minor child for a few days, took the minor child to Texas over the objection of the Plaintiff and without the Plaintiff's permission. Furthermore, Defendant is now refusing to return the child to the State of North Carolina upon Plaintiff's request.

8. The Defendant has repetitively promised to return the minor child to the State of North Carolina and has repetitively failed to return the minor child to the State of North Carolina.

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9. Upon information and belief, the Defendant has not returned the minor child to the State of North Carolina and appears to have no intent on returning the child to the State of North Carolina as the Defendant is collecting unemployment in the State of Texas.

10. The Plaintiff has flown to the State of Texas to visit with the minor child and was not allowed to bring the minor child back to the State of North Carolina and has been refused normal visitation and access to the minor child has continued to be denied.

In the 7 October 2013 motion, plaintiff sought an order holding defendant in willful civil contempt of court. Plaintiff also sought an order granting temporary emergency custody of the child to plaintiff, and to prevent defendant from removing the child from plaintiff's care and the jurisdiction of this State, pending further orders of the court.

Under the heading "Request for Return to the State of North Carolina and Temporary Custody of the Minor Child and Emergency Modification of the Prior Order," plaintiff alleges defendant has refused to return the child to the State of North Carolina, plaintiff has a loving bond with the child, defendant has denied plaintiff all access to the child, and plaintiff is fully capable of providing full-time care for the child.

V. Dismissal of First Motion

In the 30 September 2013 order, Judge Salisbury found that plaintiff had failed to prosecute the motion for contempt and *sua sponte* dismissed the motion. Unless the court specifies otherwise, an involuntary dismissal for failure to prosecute operates as an adjudication upon the merits. N.C. Gen. Stat. §1A-1, Rule 41(b) (2013). The court, in its discretion, may specify in the order that the dismissal is without prejudice and may also specify that a new action based on the same claim may be commenced within one year or less after the dismissal. *Id.*

Here, Judge Salisbury did not specify that the dismissal was without prejudice or that plaintiff may commence a new action within one year. Pursuant to N.C. Gen. Stat. §1A-1, Rule 41(b), Judge Salisbury's order dismissed plaintiff's first motion for contempt with prejudice.

"[O]ne judge may not reconsider the legal conclusions of another judge." *Adkins v. Stanly Cnty. Bd. of Educ.*, 203 N.C. App. 642, 692 S.E.2d 470 (2010). When Judge Salisbury involuntarily dismissed plaintiff's first

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contempt motion with prejudice, the court adjudicated the merits of that motion. N.C. Gen. Stat. §1A-1, Rule 41(b). Plaintiff is precluded from filing another motion with identical allegations.

Plaintiff's second motion contains additional allegations, which were not included in the first motion. The first motion only alleges defendant took the child to Texas for six weeks and refused to return the child to North Carolina upon plaintiff's request. The second motion alleges additional acts of contempt. It alleges plaintiff spent \$3,000.00 to travel to Texas to visit with the child. While plaintiff was in Texas, defendant denied him access to the child, and refused to allow plaintiff to return to North Carolina with his child. It also alleges that defendant repeatedly promised to return the child to North Carolina and had refused to do so. The allegation that defendant is collecting unemployment in the State of Texas is also not contained in the first motion. If true, this evidences defendant's intent to remain in Texas with the child in spite of the North Carolina order awarding joint custody and liberal visitation rights.

Plaintiff also requested additional relief in the second motion, which was not requested in the first motion. Specifically, in the 7 October 2013 motion, plaintiff requested the court award him emergency temporary custody of the child, because of plaintiff's failure to return the child to North Carolina from Texas. *See* N.C. Gen. Stat. § 50-13.5(d)(3) (2013) (A temporary custody order may be entered *ex parte* and prior to service of process or notice, if "there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts.").

When the parties appeared before the trial court on 28 October 2013, plaintiff's attorney represented to the court that the child was presently in North Carolina. She stated that she was seeking an order to ensure the child remained in North Carolina, and that plaintiff is able to visit with the child pursuant to the custody order. The court held the matter open until 20 May 2014.

The issue of emergency custody was not raised in the motion before Judge Salisbury on 30 September 2013 and was not adjudicated by operation of Rule 41. N.C. Gen. Stat. §1A-1, Rule 41(b). Where plaintiff raised issues in the 7 October 2013 motion, which were not raised in the 9 September 2013 motion, the trial court erred in concluding all matters had previously been adjudicated by entry of the involuntary dismissal. The 20 May 2014 order is reversed.

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VI. Conclusion

Plaintiff raised allegations and sought relief in his 7 October 2013 motion for contempt and custody, which were not raised in his 9 September 2013 motion for contempt. The court was not precluded from hearing the issues and considering the relief sought in the 7 October 2013 motion, which were not addressed in the 9 September 2013 motion. The court erred in concluding all of plaintiff's allegations and requests for relief included in the 7 October 2013 motion for contempt were adjudicated by the court's previous entry of an involuntary dismissal.

The 20 May 2014 order is reversed and the case is remanded to the district court for further proceedings consistent with this opinion. In light of our decision, it is unnecessary for us to consider defendant's remaining arguments, which are properly before us.

Reversed and remanded.

Judges ELMORE and DAVIS concur.

IN THE MATTER OF N.T.

No. COA14-974

Filed 17 March 2015

**Termination of Parental Rights—subject matter jurisdiction—
verification of petition**

The Court of Appeals vacated an order terminating respondent father's parental rights because the trial court lacked subject matter jurisdiction to enter the order. The petition alleging the juvenile neglected was not properly verified, so the trial court did not obtain subject matter jurisdiction over the matter and Wake County Human Services did not have standing to file the motion to terminate parental rights.

Appeal by respondent-father from order entered 7 May 2014 by Judge Monica Bousman in Wake County District Court. Heard in the Court of Appeals 17 February 2015.

Office of the Wake County Attorney, by Roger A. Askew and Claire A. Hunter, for petitioner-appellee Wake County Human Services.

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W. Michael Spivey for respondent-appellant father.

Poyner Spruill LLP, by Shannon E. Hoff, for guardian ad litem.

BRYANT, Judge.

Because we are bound by *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”), to acknowledge that on the facts of this case, this issue of subject matter jurisdiction is controlled by *Fansler v. Honeycutt*, 221 N.C. App. 226, 728 S.E.2d 6 (2012), we are compelled to vacate the trial court’s orders in this matter for lack of jurisdiction.

Respondent father appeals from an order terminating his parental rights to his minor child, N.T. (“Ned”).¹ Because the trial court never gained subject matter jurisdiction over the underlying juvenile case, and thus, petitioner Wake County Human Services (“WCHS”) never obtained lawful custody of Ned, we vacate the trial court’s order terminating parental rights.

On 22 May 2012, WCHS filed a juvenile petition alleging Ned was a neglected juvenile, having obtained non-secure custody of Ned the previous day. By order entered 11 July 2012, the trial court concluded Ned was a neglected juvenile and continued custody of Ned with WCHS. WCHS worked to reunify Ned with his parents, but on 19 April 2013, the trial court entered an order ceasing reunification efforts and changing the permanent plan for Ned to adoption. On 24 September 2013, WCHS filed a motion to terminate parental rights to Ned, alleging grounds of neglect, failure to make reasonable progress to correct the conditions that led to Ned’s removal from his home, and failure to pay a reasonable portion for Ned’s cost of care while he was placed outside of the home. After a four-day hearing on the motion, the trial court entered an order on 7 May 2014 terminating the parental rights of both respondent and Ned’s mother. Respondent filed timely notice of appeal.

Respondent’s sole argument on appeal is that the trial court lacked subject matter jurisdiction over the termination proceeding. Respondent

1. The pseudonym “Ned” is used throughout to protect the identity of the juvenile and for ease of reading.

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contends that because the 22 May 2012 juvenile petition was not properly verified, it did not confer subject matter jurisdiction over the underlying juvenile case to the trial court, and the trial court's orders in the juvenile case are thus void *ab initio*. Respondent argues that because the court's orders are void, WCHS was never given lawful custody of Ned and, thus, was without standing to file the motion to terminate parental rights. Based on precedent from this Court that we are compelled to follow, we agree.

"A trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition." *In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 792 (2006). Where the initial abuse, neglect, or dependency petition in a juvenile case is not properly verified, the trial court never obtains subject matter jurisdiction over the case and all of its orders are void *ab initio*. *Id.* at 588, 636 S.E.2d at 789; *see also In re S.E.P.*, 184 N.C. App. 481, 486, 646 S.E.2d 617, 621 (2007) ("In the absence of a verification a trial court's order is void *ab initio*." (citation omitted)). Thus, where an improperly verified petition is filed by a county department of social services, the department never obtains custody of the juvenile from a court of competent jurisdiction, and it lacks standing to file a petition or motion to terminate parental rights to that juvenile. *See* N.C. Gen. Stat. §§ 7B-1103(a)(3), 1104(2) (2013); *e.g. S.E.P.*, 184 N.C. App. at 487-88, 646 S.E.2d at 621-22. This Court has held that a pleading is not properly verified where the person before whom the pleading was to be verified did not indicate his title and nothing in the record established his authority to acknowledge the verification. *See Fansler*, 221 N.C. App. at 230, 728 S.E.2d at 9; *see also In re Green*, 67 N.C. App. 501, 503, 313 S.E.2d 193, 194-95 (1984) ("[W]here it is required by statute that the petition be signed and verified, these essential requisites must be complied with before the petition can be used for legal purposes." (citation omitted)).

In *Fansler*, the defendant appealed from trial court orders requiring that he refrain from stalking and harassing the plaintiffs, Mr. and Mrs. Fansler (Mr. and Mrs. Fansler filed individual complaints). *Fansler*, 221 N.C. App. 226, 728 S.E.2d 6. On appeal, this Court observed that the plaintiffs' individual complaints contained "no indication that either complaint had been verified before an individual authorized to administer oaths." *Id.* at 230, 728 S.E.2d at 9. Of particular pertinence to the current case, the *Fansler* Court noted that in the verification section of Mr. Fansler's complaint, the record reflected Mr. Fansler's signature, a date, and a signature in the block designated for the signature of the person before whom Mr. Fansler's verification had been executed; however,

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there was no indication of the status of the person whose signature appeared in the box. In other words, there was no indication that Mr. Fansler's verification had been executed before an individual authorized to administer an oath. *Id.* The *Fansler* Court reasoned as follows:

If an action is statutory in nature, the requirement that pleadings be signed and verified is not a matter of form, but substance, and a defect therein is jurisdictional, leaving a trial judge confronted with an unverified pleading devoid of subject matter jurisdiction. Put another way, where it is required by statute that the petition be signed and verified, these essential requisites must be complied with before the petition can be used for legal purposes, since non-compliance renders the petition incomplete and non-operative.

Id. at 228, 728 S.E.2d at 8 (citations and quotations omitted). Thus, the Court held that "given the absence of any indication that either of Plaintiffs' complaints had been properly verified, we hold that the trial court never obtained jurisdiction over the subject matter of these cases, that the trial court's orders should be vacated, and that both cases must be dismissed." *Id.* at 230, 728 S.E.2d at 9.

The instant case cannot be distinguished from *Fansler*. The verification section of the initial petition alleging that Ned was a neglected juvenile indicates that it was verified by Diamond Wimbish, an authorized representative of the Director of WCHS; however, the signature of the person before whom the petition was verified is illegible and there is no title given for the person before whom the petition was verified. Nothing in the record before this Court establishes that the person before whom the petition was verified was authorized to acknowledge the verification.² Given the absence of any competent evidence in the

2. WCHS has filed a motion to amend the record on appeal to include an affidavit from Wake County Magistrate Christopher H. Graves, who avers that the signature on the petition is his and that he signed the petition in his official capacity as a magistrate. However, this affidavit was never before the trial court and, thus, cannot be considered on appeal. See N.C.R. App. P. 9(a), 11(c); see also, e.g., *State v. Gay*, 334 N.C. 467, 481, 434 S.E.2d 840, 847 (1993) (refusing to consider on appeal affidavits from the trial judge and prosecutor regarding *ex parte* contact with jurors because the affidavits were not part of the record made at trial). Accordingly, we deny WCHS's motion to amend the record on appeal.

Nevertheless, we acknowledge that this Court has in unpublished opinions allowed motions to amend in circumstances where a respondent failed to challenge the verification and/or signature on the petition before the trial court and, thus, where the trial court

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record to show that the petition was properly verified, the trial court never obtained jurisdiction over the subject matter of the juvenile case. Therefore, the trial court's underlying orders are void *ab initio*, and thus, WCHS lacked standing to file the motion to terminate parental rights to Ned. *See Fansler*, 221 N.C. App. at 230, 728 S.E.2d at 9. Accordingly, as the trial court did not have subject matter jurisdiction to enter the order terminating respondent's parental rights, we must vacate its order.

Vacated.

Judges CALABRIA and DIETZ concur.

had no opportunity to rule on the issue. Such unpublished opinions are not authority upon which we could rely to allow a motion to amend. *See* N.C. R. App. 30(e)(3) ("The unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority.") Further, as neither the motion to amend nor the record on appeal indicates that the Chief District Court Judge of Wake County authorized a magistrate to verify petitions in emergency situations as required by North Carolina General Statutes, section 7B-404 — a necessary acknowledgement for receiving verification of an emergency petition, such as we have in the instant case — we would not consider suspending our rules pursuant to Rule 2.

INTEGON NAT'L INS. CO. v. MAURIZZIO

[240 N.C. App. 38 (2015)]

INTEGON NATIONAL INSURANCE COMPANY, PLAINTIFF

v.

DALJAH MAURIZZIO, BY AND THROUGH HER GUARDIAN AD LITEM, BARBARA LANGLEY, AND
JASON AND RENAE MAURIZZIO, DEFENDANTS

No. COA14-1068

Filed 17 March 2015

Insurance—automobile accident—underinsured motorist coverage (UIM)—stacking policies to calculate UIM limits—underinsured highway vehicle

The trial court did not err in a declaratory judgment case determining underinsured motorist (UIM) coverage for a single car automobile accident, involving a grandchild in her grandmother's automobile, by denying plaintiff insurance company's motion for summary judgment and granting summary judgment in favor of defendants. The applicable UIM coverage of the pertinent policies could be stacked in order to calculate the UIM limits and determine if the vehicle was an underinsured highway vehicle. The \$50,000 per person UIM coverage provided by the parents' policy stacked on the \$50,000 UIM coverage provided by the grandmother's policy, for a total of \$100,000 UIM coverage. This amount of UIM coverage was greater than the \$50,000 liability limits of the grandmother's policy. Thus, the grandmother's vehicle was an underinsured highway vehicle for the purposes of the UIM coverage claim.

Appeal by plaintiff from order entered 23 July 2014 by Judge Wayland J. Sermons, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 18 February 2015.

Frazier Hill & Fury, R.L.L.P., by Torin L. Fury, for plaintiff-appellant.

Hardee & Hardee, L.L.P., by Charles R. Hardee and Moulton B. Massey, IV, for defendants-appellees.

TYSON, Judge.

Integon National Insurance Company ("Plaintiff") appeals from order denying Plaintiff's motion for summary judgment and granting the motion for summary judgment of Daijah Maurizzio and Jason and Renae Maurizzio (collectively, "Defendants"). We affirm.

INTEGON NAT'L INS. CO. v. MAURIZZIO

[240 N.C. App. 38 (2015)]

I. Factual Background

Both parties stipulated to the following facts: On 15 February 2011, Destany Maurizzio (“Destany”) was operating a vehicle owned by her grandmother, Suzanne Maurizzio (“Suzanne”). The vehicle was involved in a single car accident. Daijah Maurizzio (“Daijah”) and Desiree’ Maurizzio (“Desiree’”) were passengers in the vehicle. Desiree’ and Daijah suffered injuries as a result of the accident.

The vehicle operated by Destany and owned by Suzanne was insured by Plaintiff. This policy provided \$50,000 per person/\$100,000 per accident in liability coverage for bodily injury and \$50,000 per person/\$100,000 per accident in underinsured motorist coverage (“UIM coverage”). The bodily injury claim of Desiree’ was settled within the available liability coverage limits provided by this policy.

Daijah sustained permanent injury in this accident. Defendants alleged expenses in excess of \$200,000 were incurred to treat her injuries. Plaintiff tendered the \$50,000 per person liability limits from Suzanne’s policy to settle Daijah’s claim pursuant to a covenant not to enforce judgment.

Daijah was not a named insured under Suzanne’s policy, nor was she a resident household member of Suzanne. However, she is an insured under Suzanne’s policy for the purposes of UIM coverage, because she was an occupant inside Suzanne’s vehicle when the accident occurred.

At the time of the accident, Daijah’s parents, Jason and Renae Maurizzio, were insured under an automobile policy also issued by Plaintiff. This policy provided \$50,000 per person/\$100,000 per accident in UIM coverage. At the time of the accident, Daijah resided with her parents and was an insured under their policy for purposes of UIM coverage.

On 27 August 2012, Plaintiff filed a complaint for declaratory judgment. Plaintiff sought for the trial court to declare the policy issued to Jason and Renae Maurizzio did not provide UIM coverage for this accident.

On 8 July 2014, Defendants filed a motion for summary judgment. Defendants contended the UIM coverage provided by Plaintiff’s policy issued to Jason and Renae Maurizzio could be stacked on the UIM coverage provided by Plaintiff’s policy issued to Suzanne for Daijah’s personal injury claim. As a result, Defendants alleged Suzanne’s vehicle was an “underinsured motor vehicle” for purposes of Daijah’s personal injury claim.

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On 14 July 2014, Plaintiff also filed a motion for summary judgment, asserting Defendants were not entitled to UIM coverage. Plaintiff contended North Carolina law did not permit the stacking of UIM coverage from Suzanne's policy with any additional UIM coverage provided to the Defendants, because more than one claimant was injured.

The parties' cross-motions for summary judgment were heard and an order was entered on 23 July 2014. The order denied Plaintiff's motion for summary judgment and granted Defendants' motion for summary judgment. Judge Sermons' order declared Plaintiff's policies issued to Suzanne and Daijah's parents provided \$100,000 in aggregate UIM coverage less a \$50,000 credit for the exhausted liability coverage. The order also declared Plaintiff's policy issued to Daijah's parents provided Defendants with \$50,000 in UIM coverage for Daijah's personal injury claim.

Plaintiff gave timely notice of appeal to this Court.

II. Issues

Plaintiff argues the trial court erred by granting Defendants' motion for summary judgment, because there were two injured parties inside the tortfeasor vehicle.

A. Standard of Review

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013).

An issue is "genuine" if it can be proven by substantial evidence and a fact is "material" if it would constitute or irrevocably establish any material element of a claim or a defense.

A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Generally this means that on undisputed aspects of the opposing evidential forecast, where there is no genuine issue of fact, the moving party is entitled to judgment

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as a matter of law. If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.

Lowe v. Bradford, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations and internal quotation marks omitted).

“In a motion for summary judgment, the evidence presented to the trial court must be . . . viewed in a light most favorable to the non-moving party.” *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (citation omitted). This Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

B. Analysis

Pursuant to N.C. Gen. Stat. § 20-279.21(b)(4) (“the Financial Responsibility Act”), an “underinsured highway vehicle” is defined as

a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner’s policy.

N.C. Gen. Stat. § 20-279.21(b)(4) (2013).

The General Assembly amended N.C. Gen. Stat. § 20-279.21(b)(4) in 2004, adding the following:

For purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an “underinsured highway vehicle” if the total amount actually paid to that person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner’s policy. Notwithstanding the immediately preceding sentence, a highway vehicle shall not be an “underinsured motor vehicle” for purposes of an underinsured motorist claim under an owner’s policy insuring that vehicle *unless the owner’s policy insuring*

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that vehicle provides underinsured motorist coverage with limits that are greater than that policy's bodily injury liability limits.

N.C. Gen. Stat. § 20-279.21(b)(4) (2013) (emphasis supplied). This amendment was subsequently referred to as the “multiple claimant exception” in *Benton v. Hanford*, 195 N.C. App. 88, 671 S.E.2d 31, *disc. review denied*, 363 N.C. 744, 688 S.E.2d 452 (2009).

Prior to the 2004 amendment to the Financial Responsibility Act, this Court decided the case of *Ray v. Atlantic Cas. Ins. Co.*, 112 N.C. App. 259, 435 S.E.2d 80, *disc. review denied*, 335 N.C. 559, 439 S.E.2d 151 (1993). In *Ray*, the plaintiff's vehicle was struck head-on by another vehicle. The plaintiff, along with two passengers in her vehicle, and the passenger in the tortfeasor's vehicle were all injured. Aetna Insurance Company (“Aetna”) insured the tortfeasor's vehicle. This policy had liability limits of \$100,000 per person/\$300,000 per accident.

Atlantic Casualty Insurance Company (“Atlantic Casualty”) insured the plaintiff, and her policy had UIM limits of \$100,000 per person/\$300,000 per accident. Aetna paid \$98,000 of its liability coverage to the injured passenger in the tortfeasor's vehicle, leaving \$202,000 in liability coverage to be divided amongst the plaintiff and her two passengers. *Id.* at 260-61, 435 S.E.2d at 80-81.

When a coverage dispute arose, this Court was required to determine whether the tortfeasor's vehicle was an “underinsured highway vehicle.” The statute, as it existed at the time, required this Court to base this determination on a comparison of the tortfeasor's overall liability coverage (not the actual liability payment) to the victim's UIM coverage. We held, although the liability funds available to be paid to the plaintiff and her two passengers were less than the plaintiff's UIM coverage, no UIM coverage was available under the Atlantic Casualty policy because the tortfeasor's vehicle was not statutorily defined as an “underinsured highway vehicle,” as the liability coverage and the UIM coverage were the same. *Id.* at 262, 435 S.E.2d at 81.

The 2004 amendment to the Financial Responsibility Act changed the rule this Court applied to reach its result in *Ray*. This amendment provided an additional definition of “underinsured highway vehicle” for situations where multiple claimants seek liability funds. Under the multiple claimant exception,

where more than one person is injured, a highway vehicle will also be an “underinsured highway vehicle” *if the*

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total amount actually paid to that person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

N.C. Gen. Stat. § 20-279.21(b)(4) (2013) (emphasis supplied).

The multiple claimant exception prevents an increase in liability or UIM exposure of the carrier providing coverage for the tortfeasor's vehicle. The exception states a vehicle is not an "underinsured motor vehicle" if the owner's policy provides UIM coverage with limits, which are less than or equal to that policy's bodily injury liability limits. *Id.*

Plaintiff contends the multiple claimant exception applies to the present case because there were two injured parties in the tortfeasor vehicle. Plaintiff asserts the multiple claimant exception applies, and the statutory amendment disallows Suzanne's vehicle from being defined as an "underinsured motor vehicle." Plaintiff argues Defendants are not entitled to any UIM coverage under either policy because the UIM limits are equal to the liability limits. [D. Br. p. 10.] We disagree.

1. Discussion of *Benton v. Hanford*

This Court considered the applicability of the multiple claimant exception in *Benton v. Hanford*, 195 N.C. App. 88, 671 S.E.2d 31 (2009). In *Benton*, the plaintiff was injured in a single car accident in a vehicle insured by Nationwide Mutual Insurance Company ("Nationwide"). The Nationwide policy had liability limits of \$50,000 per person/\$100,000 per accident and UIM limits of \$50,000 per person/\$100,000 per accident.

The plaintiff was also insured as a household resident on a Progressive Southeastern Insurance Company ("Progressive") policy providing \$100,000 per person UIM coverage. After Nationwide paid the plaintiff the policy's \$50,000 liability limits, a UIM coverage dispute arose. Progressive relied on the second sentence of the multiple claimant exception and argued, as Defendant does at bar, because the Nationwide policy provided UIM coverage with limits equal to that of the policy's bodily injury liability limits, the vehicle was not an "underinsured highway vehicle" within the meaning of the statute.

This Court noted the purpose of the Financial Responsibility Act, as stated by our Supreme Court,

is to compensate the innocent victims of financially irresponsible motorists. The Act is remedial in nature and is

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to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished. The purpose of the Act . . . is best served when every provision of the Act is interpreted to provide the innocent victim with the fullest possible protection.

Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 573-74, 573 S.E.2d 118, 120 (2002) (citations and internal quotation marks omitted).

With the statutory purpose in mind, *Benton* held “applicable UIM coverage may be stacked interpolicy to calculate the applicable limits of underinsured motorist coverage for the vehicle involved in the accident for the purpose of determining if the tortfeasor’s vehicle is an underinsured highway vehicle.” *Benton*, 195 N.C. App. at 92, 671 S.E.2d at 34 (citation and internal quotation marks omitted); *see also N.C. Farm Bureau Mut. Ins. Co. v. Bost*, 126 N.C. App. 42, 50-51, 483 S.E.2d 452, 458 (holding the legislature’s use of the plural “limits” in the statutory definition of “underinsured highway vehicle” indicates an insured may stack all applicable UIM policies to determine if the definition is met), *disc. review denied*, 347 N.C. 138, 492 S.E.2d 25 (1997).

This Court also concluded the second sentence of the multiple claimant exception “applies *only to accidents with multiple claimants*.” *Benton*, 195 N.C. App. at 94, 671 S.E.2d at 35 (emphasis supplied). The plaintiff in *Benton* was the only claimant, the multiple claimant exception did not apply, and the court utilized the general definition of “underinsured highway vehicle.” *Id.*

2. Benton’s Application to Plaintiff’s Argument

Plaintiff argues the multiple claimant exception applies here because two persons were injured. However, the enactment of the 2004 amendment following our decision in *Ray* and our subsequent holding in *Benton* clearly establish the multiple claimant exception is not triggered simply because there were two injuries in an accident. The multiple claimant exception applies only when the amount paid to an individual claimant is less than the claimant’s limits of UIM coverage after liability payments to multiple claimants. *Id.*

Here, two injuries resulted from the accident. Desiree’ Maurizzio’s bodily injury claim was settled within the per person liability coverage limits provided by Suzanne’s policy with Plaintiff. This liability payment *did not* reduce the liability coverage available for Daijah’s claim. Plaintiff tendered its full \$50,000 per person liability limits from Suzanne’s policy to settle Daijah’s claim. The multiple claimant exception does not

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apply here. The amount paid to Daijah was not reduced due to liability payments to multiple claimants. *Id.* This ruling is also consistent with our appellate courts' longstanding interpretation of the Financial Responsibility Act as a mechanism by which innocent victims may be compensated and provided with the fullest protection. *Pennington*, 356 N.C. at 573-74, 573 S.E.2d at 120; *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989); *Proctor v. N.C. Farm Bureau Mut. Ins. Co.*, 324 N.C. 221, 225, 376 S.E.2d 761, 764 (1989).

The general definition of "underinsured highway vehicle" must be used to determine the UIM coverage in this case. The applicable UIM coverage of both policies may be stacked in order to calculate the UIM limits and determine if the vehicle is an "underinsured highway vehicle." *Benton*, 195 N.C. App. at 92-93, 671 S.E.2d at 34; *Bost*, 126 N.C. App. at 50-51, 483 S.E.2d at 458.

Using these guidelines, the \$50,000 per person UIM coverage provided by the parents' policy stacks on the \$50,000 UIM coverage provided by Suzanne's policy, for a total of \$100,000 UIM coverage. This amount of UIM coverage is greater than the \$50,000 liability limits of Suzanne's policy. Suzanne's vehicle is an "underinsured highway vehicle" for the purposes of Daijah's UIM coverage claim. Plaintiff's argument is overruled.

Conclusion

The trial court's order granting summary judgment in favor of Defendants is affirmed. We also affirm the trial court's denial of Plaintiff's motion for summary judgment.

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

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MACON BANK, INC., PLAINTIFF

v.

STEPHEN P. GLEANER, DEFENDANT

Nos. COA14-809 & COA14-810

Filed 17 March 2015

1. Accord and Satisfaction—affirmative defense—promissory notes—statute of frauds—oral modification unenforceable

The trial court did not err by granting summary judgment in favor of plaintiff bank regarding deficiency judgments for promissory notes. Stephen's affidavit constituted some evidence that Stephen and plaintiff orally agreed to an accord and satisfaction that modified the 2002 and 2007 promissory notes. Because both promissory notes fell within the statute of frauds, the alleged subsequent oral modification also fell within the statute of frauds and was thus unenforceable.

2. Estoppel—equitable estoppel—deficiency judgment—promissory notes—fraud—oral modification of real property interest—statute of frauds

The trial court did not err by granting summary judgment in favor of plaintiff bank regarding deficiency judgments for promissory notes. Stephen's affidavit did not raise the factual issue of whether plaintiff is equitably estopped from collecting deficiency judgments on the 2002 and 2007 promissory notes. Stephen's affidavit did not constitute evidence supporting the application of equitable estoppel. Because defendants proffered no evidence of fraud and the alleged oral modification involved a real property interest, defendants' defense of equitable estoppel could not override the statute of frauds.

3. Mortgages and Deeds of Trust—promissory notes—deficiency—lost rents—no actual possession—no offset

The trial court did not err by granting summary judgment in favor of plaintiff bank regarding deficiency judgments for promissory notes even though defendants sought lost rents during a period when plaintiff did not exercise actual possession of the mortgaged property. Defendants have proffered no evidence that they are entitled to an offset of the judgment amount.

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Appeal by defendants Stephen P. Gleaner and Martha K. Gleaner from summary judgment orders entered 12 March 2014 by Judge Bradley Letts in Superior Court, Macon County. Heard in the Court of Appeals 2 December 2014.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Esther E. Manheimer and Lynn D. Moffa, for plaintiff-appellee.

David R. Payne, P.A., by David R. Payne, for defendants-appellants.

STROUD, Judge.

In this opinion, we consolidate Case Nos. 14-809 and 14-810. Stephen P. Gleaner appeals from the trial court's order granting summary judgment to Macon Bank, Inc. ("plaintiff") in Case No. 13 CVS 69, and Stephen P. Gleaner and Martha K. Gleaner ("defendants") appeal from the trial court's order granting summary judgment to Macon Bank, Inc. in Case No. 13 CVS 456. Defendants contend that the trial court erred in granting summary judgment in both cases, because they proffered some evidence of (1) the affirmative defense of accord and satisfaction; (2) plaintiff's breach of the duty of good faith and fair dealing; (3) the affirmative defense of equitable estoppel; and (4) defendants' right to offset arising from plaintiff's failure to account for lost rental income. We affirm.

I. Background

On 18 January 2002, plaintiff, Stephen Gleaner, and William Patterson, Stephen's business partner, executed a promissory note in which Stephen and Patterson borrowed \$260,000 from plaintiff ("the 2002 promissory note"). Stephen and Patterson used the loan proceeds to purchase undeveloped land and a rental house in Highlands, North Carolina ("the Highlands property"). Plaintiff secured the loan by executing a deed of trust on the Highlands property.

On 20 March 2007, plaintiff, Stephen, and Patterson executed a bridge loan note in which Stephen and Patterson borrowed an additional \$150,000 from plaintiff ("the 2007 promissory note"). Plaintiff secured this loan by executing another deed of trust on the Highlands property. On 11 August 2010, plaintiff, Stephen, and Martha Gleaner, Stephen's wife, agreed to a loan modification of the 2007 promissory note. On 12 August 2010, plaintiff and Stephen agreed to release Patterson from liability on the 2002 promissory note.

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On or about 30 January 2013, in Case Number 13 CVS 69, plaintiff sued Stephen for a deficiency judgment on the 2002 promissory note. Plaintiff alleged that Stephen had defaulted on the 2002 promissory note and that it had foreclosed on the Highlands property. On 3 May 2013, Stephen answered and counterclaimed for negligence, lost opportunity, and negligent non-disclosure. On 17 July 2013, plaintiff voluntarily dismissed without prejudice its action against Stephen.

On 17 July 2013, in Case Number 13 CVS 456, plaintiff sued Stephen, Martha, and Patterson for a deficiency judgment on both the 2002 and 2007 promissory notes. Plaintiff alleged that Stephen had defaulted on the 2002 promissory note, that Stephen, Martha, and Patterson had defaulted on the 2007 promissory note, and that it had foreclosed on the Highlands property.

On 16 August 2013, Stephen moved to dismiss plaintiff's second suit, because plaintiff had improperly dismissed Stephen's counterclaims in the first suit. On or about 23 October 2013, in the first suit, plaintiff moved that the trial court vacate its voluntary dismissal and reinstate its complaint pursuant to North Carolina Rule of Civil Procedure 60(b). *See* N.C. Gen. Stat. § 1A-1, Rule 60(b) (2013). On 28 October 2013, in the first suit, the trial court vacated plaintiff's voluntary dismissal and reinstated plaintiff's claim against Stephen on the 2002 promissory note. On 28 October 2013, in the second suit, the trial court granted in part Stephen's motion to dismiss and dismissed plaintiff's claim against Stephen on the 2002 promissory note, because that claim was being litigated in the first suit. But the trial court denied Stephen's motion in part and did not dismiss plaintiff's claim against Stephen, Martha, and Patterson on the 2007 promissory note. On 28 October 2013, plaintiff voluntarily dismissed without prejudice its action against Patterson.

On or about 11 December 2013, in both suits, plaintiff moved for summary judgment or judgment on the pleadings. Plaintiff proffered an affidavit in which one of its employees averred that plaintiff's complaint was true and correct. In response, Stephen proffered an affidavit in which he averred that, in late 2010 or early 2011, Caroline Huscusson, plaintiff's employee, told him to "stop making any payments on the loans" and that plaintiff "would take care of it." Stephen averred that he told Huscusson that he would give plaintiff the Highlands property "in lieu of any foreclosure or any other judgment or other losses." Stephen further averred that he "[e]ventually" gave plaintiff the keys to the rental house and heard nothing from plaintiff until one year later when he received plaintiff's notice of foreclosure. Stephen also averred that

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he did not lease the rental house during that year because Huscusson had said that plaintiff would be “taking care of it.”

On 10 February 2014, the trial court held a hearing on plaintiff’s motion. On 12 March 2014, the trial court granted summary judgment to plaintiff in both suits. In the first suit, the trial court awarded plaintiff \$45,864.29 plus interest against Stephen, and in the second suit, the trial court awarded \$106,605.51 plus interest against Stephen and Martha. On 20 March 2014, Stephen gave timely notice of appeal in the first suit, and Stephen and Martha gave timely notice of appeal in the second suit.

II. Standard of Review

We review a trial court’s summary judgment order *de novo* and view the evidence in the light most favorable to the non-movant. *Erthal v. May*, ___ N.C. App. ___, ___, 736 S.E.2d 514, 517 (2012), *appeal dismissed and disc. rev. denied*, 366 N.C. 421, 736 S.E.2d 761 (2013). We engage in a two-part analysis of whether:

(1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.

Summary judgment is appropriate if: (1) the non-moving party does not have a factual basis for each essential element of its claim; (2) the facts are not disputed and only a question of law remains; or (3) if the non-moving party is unable to overcome an affirmative defense offered by the moving party.

Id. at ___, 736 S.E.2d at 517 (citations and quotation marks omitted). We review a trial court’s interpretation of a contract *de novo*, since it is a question of law. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000).

III. Accord and Satisfaction

[1] Defendants contend that the trial court erred in granting summary judgment, because Stephen’s affidavit constitutes some evidence that Stephen and plaintiff orally agreed to an accord and satisfaction that modified the 2002 and 2007 promissory notes.¹ Defendants assert

1. Defendants also characterize the alleged oral modification as a compromise and settlement. The doctrines of accord and satisfaction and compromise and settlement carry

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that Stephen and plaintiff orally agreed to an accord in which Stephen would give plaintiff the Highlands property in satisfaction of the outstanding debt.

An accord and satisfaction is compounded of the two elements enumerated in the term. An accord is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or tort, something other than or different from what he is, or considers himself, entitled to; and a satisfaction is the execution, or performance, of such an agreement.

In re Foreclosure of Five Oaks Recreational Ass'n, Inc., 219 N.C. App. 320, 326, 724 S.E.2d 98, 102 (2012) (quotation marks omitted).

Plaintiff responds that the statute of frauds renders the alleged oral modification unenforceable under N.C. Gen. Stat. § 22-5 (2009). N.C. Gen. Stat. § 22-5 provides:

No commercial loan commitment by a bank, savings and loan association, or credit union for a loan in excess of fifty thousand dollars (\$50,000) shall be binding unless the commitment is in writing and signed by the party to be bound. As used in this section, the term “commercial loan commitment” means an offer, agreement, commitment, or contract to extend credit primarily for business or commercial purposes and does not include charge or credit card accounts, personal lines of credit, overdrafts, or any other consumer account. Offers, agreements, commitments, or contracts to extend credit primarily for aquaculture, agricultural, or farming purposes are specifically exempted from the provisions of this section.

N.C. Gen. Stat. § 22-5. “When the original agreement comes within the Statute of Frauds, subsequent oral modifications of the agreement are

the following two distinctions: (1) performance is necessary to complete an accord and satisfaction but is not necessary to complete a compromise and settlement; and (2) an accord and satisfaction may be based upon an undisputed or liquidated claim, whereas a compromise and settlement must be based upon a disputed claim. *Bizzell v. Bizzell*, 247 N.C. 590, 601, 101 S.E.2d 668, 676, *cert. denied*, 358 U.S. 888, 3 L. Ed. 2d 115 (1958). Here, defendants contend that, under the oral modification, Stephen performed by giving the Highlands property to the bank, and the parties do not dispute the amounts that defendants originally owed under the 2002 and 2007 promissory notes. Accordingly, the alleged agreement would constitute an accord and satisfaction, rather than a compromise and settlement. *See id.*, 101 S.E.2d at 676.

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ineffectual.” *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 465, 323 S.E.2d 23, 26 (1984).

Both the 2002 and 2007 promissory notes qualify as a “commercial loan commitment” exceeding \$50,000 under N.C. Gen. Stat. § 22-5. Under the 2002 promissory note, plaintiff lent \$260,000 so that Stephen and his real estate business partner could purchase the undeveloped land and the rental house as an investment. *See* N.C. Gen. Stat. § 22-5. Under the 2007 promissory note, plaintiff lent \$150,000 to Stephen and his real estate business partner. *See id.* Defendants assert that, in late 2010 or early 2011, Stephen and plaintiff orally agreed to a modification of the 2002 and 2007 promissory notes. But because both promissory notes fall within the statute of frauds, we hold that this alleged subsequent oral modification also falls within the statute of frauds and is thus unenforceable. *See Clifford*, 312 N.C. at 465, 323 S.E.2d at 26. Accordingly, we hold that defendant’s affidavit does not constitute evidence of accord and satisfaction.²

IV. Equitable Estoppel

[2] Defendants next contend that Stephen’s affidavit raises the factual issue of whether plaintiff is equitably estopped from collecting deficiency judgments on the 2002 and 2007 promissory notes.

The doctrine of estoppel rests upon principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result. In appropriate cases, equitable estoppel may override the statute of frauds so as to enforce an otherwise unenforceable agreement. When faced with oral agreements involving real property interests, our courts have limited the application of the equitable estoppel doctrine to situations where the party seeking to invoke the statute of frauds has engaged in “plain, clear and deliberate fraud.” The rationale for applying the equitable estoppel doctrine is quite obvious: A party who engages in fraud

2. Defendants also assert that plaintiff breached the duty of good faith and fair dealing implied in every contract. *See Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 56, 607 S.E.2d 286, 291 (2005). But in light of our holding that the alleged oral modification is not a valid contract, we hold that defendants have proffered no evidence that plaintiff breached the implied duty of good faith and fair dealing. Defendants also mention the legal theory of negligent non-disclosure but do not provide any supporting argument. Accordingly, we do not address this issue. *See* N.C.R. App. P. 28(b)(6) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”).

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should not be permitted to shield itself from liability through the use of a statute which our legislature specifically designed to prevent fraud.

B & F Slosman v. Sonopress, Inc., 148 N.C. App. 81, 85-86, 557 S.E.2d 176, 179-80 (2001) (citations and quotation marks omitted), *disc. rev. denied*, 355 N.C. 283, 560 S.E.2d 795 (2002). The essential elements of actual fraud are: (1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with an intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party. *Forbis v. Neal*, 361 N.C. 519, 526-27, 649 S.E.2d 382, 387 (2007).

Stephen did not aver in his affidavit that plaintiff intended to deceive him and thus defendants have not proffered any evidence of actual fraud. *See id.*, 649 S.E.2d at 387. Because defendants have proffered no evidence of fraud and the alleged oral modification involves a real property interest, we hold that defendants' defense of equitable estoppel cannot override the statute of frauds. *See Slosman*, 148 N.C. App. at 85-86, 557 S.E.2d at 180. Accordingly, we hold that Stephen's affidavit does not constitute evidence supporting the application of equitable estoppel.

V. Right to Offset

[3] Defendants further contend that Stephen's affidavit constitutes some evidence that they are entitled to an offset of the judgment amount. Defendants assert that plaintiff owes them lost rent from the date Stephen gave plaintiff the keys to the rental house to the date of foreclosure, because, as a mortgagee-in-possession, plaintiff had a duty to account for rent. Here, plaintiff secured both loans by executing deeds of trust on the Highlands property.

North Carolina is considered a title theory state with respect to mortgages, where a mortgagee does not receive a mere lien on mortgaged real property, but receives legal title to the land for security purposes. In North Carolina, deeds of trust are used in most mortgage transactions, whereby a borrower conveys land to a third-party trustee to hold for the mortgagee-lender, subject to the condition that the conveyance shall be void on payment of debt at maturity. Thus, in North Carolina, the trustee holds legal title to the land.

Countrywide Home Loans, Inc. v. Reed, 220 N.C. App. 504, 509, 725 S.E.2d 667, 671 (2012).

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A mortgagee after default is entitled to possession of the mortgaged premises, and, to secure possession, may maintain an action against the mortgagor. But [a] mortgagee's right to possession is only for the better security of the debt owing to him. When he takes possession he becomes liable to keep such premises in usual repair and to account for the rents and profits received, in a settlement of the mortgage debts. The rents with which a mortgagee or trustee in possession is chargeable are applicable as credits on the debt secured by the mortgage. A mortgagee has no right to possession except to assure payment of the debt or performance of other conditions of the mortgage.

Gregg v. Williamson, 246 N.C. 356, 359, 98 S.E.2d 481, 484 (1957) (citations and quotation marks omitted). A mortgagee-in-possession must pay the "highest fair rent" and becomes responsible for "all such acts or omissions as would . . . constitute claims on an ordinary tenant, because by entry and possession he makes himself 'tenant of the land[.]'" *Green v. Rodman*, 150 N.C. 145, 147, 63 S.E. 732, 734 (1909) (quotation marks omitted).

To qualify as a mortgagee-in-possession, a mortgagee must exercise "actual possession of the physical property to the exclusion of [the mortgagor]." *24th & Dodge v. Acceptance Ins. Co.*, 690 N.W.2d 769, 774 (Neb. 2005) (citing *In re Olick*, 221 B.R. 146, 156-57 (Bankr. E.D. Pa. 1998), *U.S. Fid. & Guar. v. Old Orchard Plaza*, 672 N.E.2d 876, 882 (Ill. App. Ct. 1996), and *Prince v. Brown*, 856 P.2d 589 (Okla. Civ. App. 1993)). In other words, a mortgagee must exercise more than mere constructive possession to become a mortgagee-in-possession. *Id.* A person has constructive possession when he "has the intent and capability to maintain control and dominion over [the property]" despite not having actual possession. *State v. Lakey*, 183 N.C. App. 652, 656, 645 S.E.2d 159, 161 (2007) (discussing constructive possession in a criminal law context).

In his affidavit, Stephen avers that he told Huscusson that he would give plaintiff the Highlands property and that he "[e]ventually" gave plaintiff the keys to the rental house. Although defendants arguably have proffered some evidence that plaintiff had constructive possession of the rental house upon delivery of the keys, defendants proffer no evidence that plaintiff exercised actual possession of the rental house or that they were excluded from the rental house. *See 24th & Dodge*, 690 N.W.2d at 774. Accordingly, we hold that plaintiff was not a mortgagee-in-possession and thus need not account for any lost rental income. *See*

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id. (holding that a mortgagee who acts upon an assignment of rents without taking actual possession of the mortgaged property had no duty to collect rents); *Peugh v. Davis*, 113 U.S. 542, 544, 28 L. Ed. 1127, 1128 (1885) (holding that a mortgagee was not liable for rent when the mortgagee's possession of the mortgaged property was merely constructive and the property was vacant and worthless).

Defendants' reliance on *Mills v. Building & Loan Assn.* is misplaced. *See* 216 N.C. 668, 671, 6 S.E.2d 549, 551 (1940). There, a mortgagor sued a mortgagee for rents and profits received *after* the mortgagee had foreclosed on the mortgaged property, had purchased the property at the foreclosure sale, and had begun possession. *Id.* at 666, 6 S.E.2d at 550. The North Carolina Supreme Court held that the foreclosure was wrongful and reversed the trial court's decision to dismiss the mortgagor's action. *Id.* at 671, 6 S.E.2d at 553. In contrast, here, defendants seek lost rents during a period when plaintiff did not exercise actual possession of the mortgaged property. Accordingly, we hold that defendants have proffered no evidence that they are entitled to an offset of the judgment amount.

VI. Conclusion

For the foregoing reasons, we affirm the trial court's orders granting summary judgment to plaintiff.

Affirmed.

Judges CALABRIA and McCULLOUGH concur.

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[240 N.C. App. 55 (2015)]

STATE OF NORTH CAROLINA

v.

FRANKLIN MARCUS GRULLON, JR.

No. COA14-104

Filed 17 March 2015

1. Appeal and Error—invited error—re-reading of jury instructions—failure to object

In his trial for murder and robbery charges, defendant did not invite error when he failed to object to the trial court re-reading the instructions to the jury.

2. Homicide—first-degree murder—lying in wait—intent

In defendant's trial for first-degree murder, the trial court did not err by instructing the jury on a lying in wait theory of murder. There was sufficient evidence that defendant assaulted the victim after lying in wait, proximately causing his death. There is no requirement that the defendant have intended or expected the victim to die as a result of the assault.

3. Homicide—first-degree murder—merger doctrine—multiple theories of conviction

In defendant's trial resulting in convictions for first-degree murder, attempted robbery, and conspiracy to commit armed robbery, the trial court properly did not arrest judgment on one of defendant's convictions for attempted robbery. Because the jury found defendant guilty of first-degree murder under the theories of both felony murder and lying in wait, felony murder was not the sole theory of first-degree murder and the merger doctrine did not apply.

Appeal by defendant from judgments entered 27 August 2013 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 June 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellant.

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GEER, Judge.

Defendant Franklin Marcus Grullon, Jr. appeals his convictions of first degree murder, attempted robbery, and conspiracy to commit armed robbery. Defendant argues primarily that the trial court erred in instructing the jury on a lying in wait theory of first degree murder because the State offered no evidence that defendant had a “deadly purpose” to kill. However, because our courts do not require proof of a specific intent to kill – which we hold is synonymous with a deadly purpose to kill – in order to support a lying in wait theory of murder, and because the evidence presented at trial was sufficient to support a jury instruction regarding lying in wait, we find no error.

Facts

The State’s evidence tended to show the following facts. In the winter of 2009, defendant became acquainted with Raymond Ervin and stayed at Ervin’s apartment in Charlotte, North Carolina several times. Ervin had previously sold drugs with Jonathan Crawford. While staying at Ervin’s apartment, defendant saw Crawford’s car and noted that it had valuable tire rims that were worth \$10,000.00 or more. This prompted defendant – under the pretense of wanting to get involved in drug dealing – to begin asking Ervin for information about Crawford and his car.

After several weeks, defendant formulated a plan to rob Crawford. When defendant told Ervin about his plan, Ervin informed defendant that Crawford did not carry a gun and that Crawford often frequented the Chocolate City Club in South Carolina, stopping afterward at a Hess 24-hour gas station.

On 7 January 2010, defendant engaged in a three-way phone call with his girlfriend and mother of his son, Lizzette Drumgo, and Jasmine Johnson. Throughout the call, Ervin could be heard in the background, sometimes instructing defendant on what to say. The four formulated a plan for Johnson to text Crawford, pretending to have met him at the Chocolate City or the Hess station. Johnson would then lure Crawford to an empty apartment where the group could rob him.

Johnson texted Crawford as planned. Although Crawford was initially skeptical of Johnson’s story regarding their purported encounter, he eventually believed it had occurred. Johnson continued to text with Crawford, and on the evening of 9 January 2010, Johnson met with Ervin, Drumgo, and defendant at Ervin’s apartment and texted Crawford in order to lure him to the apartment to rob him. Crawford did not

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immediately reply, and Johnson began to feel sick and went home prior to any response from Crawford. Defendant decided to still go through with the plan, however, and had Drumgo begin texting Crawford, pretending to be Johnson using another phone.

Crawford was driving to a club with his friend Kelvin Clark when Crawford received Drumgo's texts and agreed to meet at the apartment complex where defendant, Drumgo, and Ervin were setting the stage for the robbery. Defendant told Ervin to wait for Drumgo to bring Crawford and Clark to the darkened apartment and then to grab one of the men while defendant came out from under the stairs and held the gun on the other. Defendant then hid under a dark stairwell with a gun, waiting for Crawford and Clark to arrive.

When Crawford and Clark arrived at the apartment complex, Drumgo met them and took them down to the darkened apartment. Immediately after Drumgo went to turn on the lights, leaving Crawford and Clark alone in the doorway, Crawford and Clark were pushed into the apartment from behind.

Either Ervin or defendant had a gun and dark cloth wrapped around his head and said something like, "You know what this is." Either Crawford or Clark responded, "we ain't got nothing." There was a scuffle with one or two gunshots, and Clark fell to the floor while Crawford dove through a window, ran into the woods, and called 911. Clark died minutes later from a gunshot wound through the chest.

Panicked, defendant, Ervin, and Drumgo fled, leaving Clark on the floor along with his jewelry and over \$1,300.00 in his wallet. Drumgo was later found at defendant's mother's house, and Ervin and defendant were arrested four days later in an abandoned apartment they had broken into in Fayetteville.

Defendant was tried in Mecklenburg County Superior Court on charges of first degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. On 27 August 2013, the jury returned verdicts finding defendant guilty of first degree murder, two counts of robbery with a dangerous weapon, and one count of conspiracy to commit robbery with a dangerous weapon. The trial court sentenced defendant to life imprisonment without parole for the first degree murder charge, followed by two consecutive presumptive-range terms of 73 to 97 months imprisonment for two counts of attempted robbery with a dangerous weapon and a concurrent term of 29 to 44 months imprisonment for conspiracy to commit armed robbery. Defendant timely appealed to this Court.

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Discussion

[1] Defendant first argues that there was insufficient evidence to support a jury instruction on lying in wait. In examining the sufficiency of the evidence supporting a jury instruction on appellate review, “[a]ll evidence actually admitted, both competent and incompetent, which is favorable to the State must be considered.” *State v. Woodward*, 324 N.C. 227, 230, 376 S.E.2d 753, 755 (1989) (quoting *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984)). “[T]he evidence must be considered by the court in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence.” *Id.*, 376 S.E.2d at 754-55 (quoting *Bullard*, 312 N.C. at 160, 322 S.E.2d at 387-88). We review the trial court’s decision to give the instruction de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

The State contends that defendant has waived the right to appeal the issue. Although the State concedes that defendant initially objected to the instruction, the State argues that defendant then waived his objection by later not objecting when the court gave a verbatim repetition of the contested instruction.

Because a “defendant is not prejudiced by . . . error resulting from his own conduct[,]” N.C. Gen. Stat. § 15A-1443(c) (2013), “a defendant who invites error . . . waive[s] his right to all appellate review concerning the invited error, including plain error review.” *State v. Goodwin*, 190 N.C. App. 570, 574, 661 S.E.2d 46, 49 (2008) (quoting *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001)). In arguing invited error, the State relies exclusively on *State v. Wilkinson*, 344 N.C. 198, 474 S.E.2d 375 (1996).

In *Wilkinson*, the Supreme Court held that the defendant invited error regarding the instruction because the defendant “did not object to the charge as given,” but instead “agreed at the charge conference to have the instruction given as it was” by saying, “That will be fine.” *Id.* at 235, 474 S.E.2d at 395, 396. The Court held: “‘Since [the defendant] asked for the exact instruction that he now contends was prejudicial, any error was invited error.’” *Id.* at 214, 474 S.E.2d at 383 (quoting *State v. McPail*, 329 N.C. 636, 644, 406 S.E.2d 591, 596 (1991)).

In this case, however, defendant only assented when the trial court proposed re-reading the instructions in response to a direct jury question:

[THE COURT:] [The question] says, need judge’s guidelines . . . [regarding] the law on the first-degree murder charge

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... I understand his question to ask me to repeat the instructions, the substantive instructions for the two first-degree murder charges. And that's what I would propose to do.

Defendant responded to the trial court's proposal to repeat the instructions by stating, "If you wish to repeat them, that seems to make sense." The court then repeated the lying in wait instruction to the jury without further objection by defendant.

However, because the trial court had already decided the issue regarding the sufficiency of the evidence to support the lying in wait instruction, overruling defendant's objection, defendant did not invite error by failing to repeat that objection when the trial court proposed responding to the jury question by re-reading the exact same instructions the jury had already heard once. The State cites no authority, nor have we found any authority, holding that a defendant invites error when his objection to an instruction is overruled, and the defendant does not repeat that objection when the judge simply re-reads the instruction upon jury request. *Compare Goodwin*, 190 N.C. App. at 574, 661 S.E.2d at 49 ("[The defendant's] attorney specifically requested that the jury not be instructed as to self-defense, and thus [the] defendant [invited the error.]"). We therefore conclude that defendant did not invite error by failing to renew his objection, and the jury instruction issue is properly preserved for appellate review.

[2] We turn next to defendant's main contention that the trial court erred in instructing the jury on a lying in wait theory of murder due to insufficient evidence regarding defendant's intent. Defendant contends that the State must present evidence that "lying in wait was the perpetrator's 'means of' accomplishing a '*murder*'" and that, when lying in wait, defendant had a "deadly purpose" or "purpose to kill." (Quoting N.C. Gen. Stat. § 14-17(a) (2013); *State v. Leroux*, 326 N.C. 368, 375, 390 S.E.2d 314, 320 (1990).) Our Supreme Court has, however, held otherwise.

N.C. Gen. Stat. § 14-17(a) defines murder generally and provides in pertinent part that:

A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined by G.S. 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping,

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burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree

Our Supreme Court has construed the statute as separating first degree murder into four distinct classes:

“(1) murder perpetrated by means of poison, lying in wait, imprisonment, starving or torture; (2) murder perpetrated by any other kind of willful, deliberate and premeditated killing; (3) murder committed in the perpetration or attempted perpetration of certain enumerated felonies; and (4) murder committed in the perpetration or attempted perpetration of any other felony committed or attempted with the use of a deadly weapon.”

State v. Evangelista, 319 N.C. 152, 157, 353 S.E.2d 375, 380 (1987) (quoting *State v. Johnson*, 317 N.C. 193, 202, 344 S.E.2d 775, 781 (1986)).

North Carolina defines “first-degree murder perpetrated by means of lying in wait” as “‘a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim.’” *Leroux*, 326 N.C. at 375, 390 S.E.2d at 320 (quoting *State v. Allison*, 298 N.C. 135, 147, 257 S.E.2d 417, 425 (1979)). Our Supreme Court has specifically held that “[p]remeditation and deliberation are not elements of the crime of first-degree murder perpetrated by means of lying in wait, nor is a specific intent to kill. The presence or absence of these elements is irrelevant.” *Id.* “[L]ying in wait is a physical act” and “does not require a finding of any specific intent.” *State v. Baldwin*, 330 N.C. 446, 461, 462, 412 S.E.2d 31, 40-41 (1992).

A requirement that the State prove a “deadly purpose” or a “purpose to kill” is no different than requiring proof of a deadly intent or an intent to kill. “Purpose” is a synonym for “intent” and, therefore, our Supreme Court’s precedent forecloses defendant’s contention.

As the Supreme Court has previously held, “[h]omicide by lying in wait is committed when: the defendant lies in wait for the victim, that is, waits and watches for the victim in ambush for a private attack on him, intentionally assaults the victim, proximately causing the victim’s death.” *State v. Camacho*, 337 N.C. 224, 231, 446 S.E.2d 8, 12 (1994) (internal citations omitted). In other words, a defendant need not intend, have a purpose, or even expect that the victim would die. The only requirement is that the assault committed through lying in wait be a proximate cause of the victim’s death.

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Defendant points to references in Supreme Court opinions to a defendant's "purpose to kill" the victim. *See, e.g., Allison*, 298 N.C. at 148, 257 S.E.2d at 425. The Court in *Allison*, however, referenced the "purpose to kill" only if the victim is aware of the defendant's presence: "If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, *if he does know*, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait." *Id.* (emphasis added). *See also Leroux*, 326 N.C. at 375, 390 S.E.2d at 320 (holding that for lying in wait instruction, defendant "need not be concealed, nor need the victim be unaware of his presence[,] but if victim does know of defendant's presence, then victim must be unaware of defendant's purpose to kill him). As our Supreme Court explained, *Leroux* and *Allison* hold "that a lying in wait killing requires some sort of ambush and surprise of the victim." *State v. Lynch*, 327 N.C. 210, 217, 393 S.E.2d 811, 815 (1990). Consequently, when the defendant is not concealed and the victim is aware of the defendant's presence, then the ambush and surprise required for lying in wait is supplied by the victim's lack of awareness that the defendant has a purpose or intent to kill the victim. Since, in this case, defendant does not dispute that he hid under a darkened staircase for the purpose of robbing the victim, there was no need of any further showing of ambush and surprise.

In support of his contention that the State must show a "deadly purpose," defendant also cites several secondary sources: *Homicide: What Constitutes "Lying in Wait,"* 89 A.L.R.2d 1140 § 1b (stating that lying in wait contains a "mental element[]" of "purpose or intent to inflict bodily injury or to kill" another), and 40 Am. Jur. 2d *Homicide* § 42 (using nearly identical language to describe "[w]hat constitutes lying in wait"). These authorities demonstrate that "purpose" and "intent" are synonymous – therefore, those authorities define lying in wait in a manner inconsistent with our Supreme Court. However, "[the Court of Appeals] has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme Court." *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (internal quotation marks omitted).

With respect to the sufficiency of the evidence to support a lying in wait instruction under controlling Supreme Court precedent, our Supreme Court has upheld inclusion of the instruction in similar cases involving an intent to ambush a victim for the purpose of committing a robbery. *See, e.g., State v. Richardson*, 346 N.C. 520, 527, 488 S.E.2d 148, 152 (1997) (upholding lying in wait instruction when evidence tended

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to show defendant went to store where victim worked “so he could get some money,” waited in a parked car until closing, attacked victim as she left store, killed her, then broke into store using victim’s keys); *State v. Joyner*, 329 N.C. 211, 214, 404 S.E.2d 653, 654 (1991) (upholding lying in wait instruction when evidence tended to show defendant waited behind trailer, killed his victim, and later explained that “he had been thinking for a few days about robbing the victim but did not want to do so in a place where the victim could see him”).

Here, over the course of several weeks defendant formulated a plan to rob the victim and then waited underneath a darkened staircase for the opportunity to do so. Like *Richardson*, where the initial rationale for the concealed attack on the victim was to “get some money” but nevertheless ended in murder, 346 N.C. at 527, 488 S.E.2d at 152, here, the attack by defendant also was for the purpose of robbery but ended in murder. Consequently, viewing the evidence in the light most favorable to the State, the lying in wait instruction was sufficiently supported by the evidence.

[3] Additionally, defendant argues that at least one of the attempted robbery convictions should be arrested due to the merger doctrine. The merger doctrine provides that “when the sole theory of first-degree murder is the felony murder rule, a defendant cannot be sentenced on the underlying felony in addition to the sentence for first-degree murder[.]” *State v. Wilson*, 345 N.C. 119, 122, 478 S.E.2d 507, 510 (1996). However, because the jury found defendant guilty of first degree murder based upon both felony murder and lying in wait, and we have upheld the conviction based on lying in wait, the trial court properly did not arrest judgment on defendant’s conviction of attempted robbery. *See id.* at 122-23, 478 S.E.2d at 510 (holding that “defendant can only be punished for both murder and the underlying felony” if convicted “of first-degree murder under [multiple] theories”).

No error.

Judges BRYANT and CALABRIA concur.

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[240 N.C. App. 63 (2015)]

STATE OF NORTH CAROLINA

v.

ROBERT ARTHUR PACE

No. COA14-802

Filed 17 March 2015

1. Evidence—hearsay—opinion—minor sex assault victim’s changed demeanor—no plain error or abuse of discretion

The trial court did not commit plain error in a first-degree rape and indecent liberties with a child case by allowing the victim’s mother to provide certain hearsay testimony, nor did it abuse its discretion in allowing the mother to offer an opinion as to changes she observed in her daughter’s behavior after the assault. The mother’s response constituted a shorthand statement of fact and therefore did not qualify as improper lay opinion testimony under Rule 701. Further, it was improbable that the jury’s finding of guilt would have differed if the trial court had excluded the testimony.

2. Jury—jury instruction—use of iPads and tablet computers by jurors for notetaking

The trial court did not commit plain error in a first-degree rape and indecent liberties with a child case by giving its jury instruction on the use of iPads and tablet computers after authorizing their use by the jurors for note-taking purposes.

3. Sentencing—aggravated sentence—remanded for resentencing

The trial court erred in a first-degree rape and indecent liberties with a child case by sentencing defendant to an aggravated sentence. The case was remanded to the trial court for resentencing with instructions to conduct further proceedings.

Appeal by Defendant from judgments entered 5 December 2013 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 3 December 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Margaret A. Force, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for the Defendant.

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DILLON, Judge.

Robert Arthur Pace (“Defendant”) appeals from judgments entered upon a jury verdict finding him guilty of first-degree rape and indecent liberties with a child. We find no error in part and we vacate in part with instructions to the trial court to conduct further proceedings consistent with this opinion.

I. Background

The evidence tended to show the following: On 16 September 1989, an unknown male intruder broke into the room where the victim, a female, was sleeping. The victim was seven years old at the time. The intruder ordered the victim to turn over on her stomach; he pulled down her panties; he licked her anal area; and he began to penetrate her vaginally and anally while holding the blade of a knife to her nose. When he had finished, he escaped out the window.

The victim’s mother took her to the emergency room after the incident. While there, a doctor examined the victim and also processed a rape kit, sealing it and handing it over to police.

Thereafter, the case went cold for many years. In 2013, however, an agent with the State Bureau of Investigation (“SBI”) determined that DNA present on the victim’s panties, stored with the rape kit, matched a DNA profile now present in CODIS, the State’s Combined DNA Index System, a database of DNA samples taken from convicted offenders. Based on that match, the State came to suspect Defendant. The State obtained an additional sample of Defendant’s DNA to compare to the DNA detected on the victim’s panties. Based on that comparison, the SBI agent confirmed the match.

Defendant was indicted on various charges in connection with the 1989 attack. He was tried by a jury, which found him guilty of one count of first-degree rape and one count of taking indecent liberties with a child.

The trial court entered separate judgments on each conviction, sentencing Defendant to life in prison for first-degree rape and an additional ten years in prison for indecent liberties, and ordering that the sentences run consecutively. Defendant entered his notice of appeal in open court.¹

1. Defendant appears to have entered his notice of appeal prematurely, after the jury returned its verdict but before the court imposed a sentence, and has, therefore, petitioned this Court for writ of certiorari. We hereby grant Defendant’s petition.

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II. Analysis

Defendant essentially makes three arguments on appeal, which we address in turn.

A. Evidentiary Issues

[1] Defendant's first argument concerns the trial testimony of the victim's mother. Specifically, Defendant contends that the trial court committed plain error in allowing her to provide certain hearsay testimony and that the court abused its discretion in allowing her to offer an opinion as to changes she observed in her daughter's behavior after the assault. We disagree.

"Unpreserved error . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred . . . [that] had a *probable* impact on the jury's finding[.]" *Id.* at 518, 723 S.E.2d at 334 (internal marks and citation omitted) (emphasis added).

In the present case, the victim's mother testified that when she took her daughter to counseling, she was told, "[s]omething violent has happened to her." Assuming, *arguendo*, that this testimony constituted inadmissible hearsay – as evidence that the alleged sexual assault in fact occurred, see N.C. Gen. Stat. § 8C-1, Rules 801, 802 (2013), Defendant failed to object to this testimony, and we do not believe the trial court's failure to strike the testimony on its own motion had a *probable* impact on the jury's verdict. See *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Rather, the State presented substantial, uncontradicted evidence that the assault in fact occurred and that Defendant was the perpetrator. The victim described the assault in detail during her testimony. The emergency room doctor testified to the presence of "lacerations or large bruises" on the victim. The State tendered experts in DNA analysis and forensic serology who both testified to the presence of semen on the victim's panties. One expert in DNA analysis stated that the sperm found on the victim's panties matched Defendant's DNA, and that "[t]he probability of randomly selecting an unrelated individual with a DNA profile that matches the DNA profile obtained from the sperm fraction from the cutting from the [victim's] panties is one in greater than one trillion, which is more than the world population[.]"

In light of this evidence, we do not believe it is *probable* that the jury's finding of guilt would have differed if the trial court had excluded

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the complained-of testimony. Accordingly, Defendant's contention is overruled.

Defendant contends in the alternative that the complained-of testimony constituted impermissible vouching. Again, based on the other evidence in the record, we do not believe it is *probable* that the jury's finding of guilt would have differed if the trial court had excluded the complained-of testimony. Accordingly, Defendant's contention in the alternative is also overruled.

Defendant next contends that the trial court abused its discretion in allowing the victim's mother to testify about changes she observed in her daughter that she believed were a direct result of the assault, claiming such testimony constituted improper lay opinion testimony. We disagree.

We review a trial court's rulings on the admissibility of lay opinion testimony for an abuse of discretion. *State v. Collins*, 216 N.C. App. 249, 254, 716 S.E.2d 255, 259-60 (2011). Rule 701 of the North Carolina Rules of Evidence limits admissible lay opinion testimony to "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2013).

However, we have long recognized that Rule 701 does not render "shorthand statement[s] of fact" inadmissible. *State v. Wade*, 155 N.C. App. 1, 14, 573 S.E.2d 643, 652 (2002) (internal marks omitted). A "shorthand statement of fact" has been defined as "the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." *Id.* (internal marks omitted). While themselves opinions, we have explained that

[a]llowance of opinions in the form of a 'shorthand statement of fact' is premised upon the notion that a description of all the underlying detailed facts that helped to form the witness' opinion may be possible, but is not practical due to the inherent difficulties in articulating one's analytical thought processes.

State v. Lesane, 137 N.C. App. 234, 244, 528 S.E.2d 37, 44 (2000).

In the present case, the following colloquy transpired on direct examination of the victim's mother:

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[PROSECUTOR]: And what other changes did you observe in her that you believe are a direct result of her being sexually assaulted?

[DEFENDANT²]: Objection, Your Honor.

THE COURT: Objection overruled.

[PROSECUTOR]: You can answer.

[VICTIM'S MOTHER]: She was mean. She was—she didn't want to do things. She was—wanted to fight. She was violent. She just—all these things.

Defendant characterizes this testimony as generally inadmissible because it states a conclusion or inference properly reserved to the jury or alternately as vouching for the credibility of a lay diagnosis of some malady about which only an expert witness would be properly qualified to opine. However, we believe the context surrounding the response demonstrates that the witness was merely describing the differences she observed in her daughter's behavior after being sexually assaulted. While "a description of all the underlying detailed facts that helped to form the witness'[s] opinion may [have been] possible," we do not believe it would be practical to require such a description. *Id.* at 244, 528 S.E.2d at 44. We hold that the victim's mother's response to the objected-to question constituted a shorthand statement of fact and therefore did not qualify as improper lay opinion testimony under Rule 701. Accordingly, Defendant's contention is overruled.

B. Jury Instructions

[2] Defendant next argues that the trial court committed plain error by giving a fatally inadequate jury instruction on the use of iPads and tablet computers after authorizing their use by the jurors for note-taking purposes. We disagree.

North Carolina law affords the presiding judge considerable discretion over the manner in which to conduct a trial. *State v. Rhodes*, 290 N.C. 16, 23, 224 S.E.2d 631, 635 (1976). "Generally, in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within his discretion." *Id.* Whether to allow the jurors to take notes, for example, "is a discretionary decision

2. Defendant waived his right to counsel, representing himself at trial.

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made by the trial court.” *State v. Crawford*, 163 N.C. App. 122, 127, 592 S.E.2d 719, 723 (2004).

In the present case, the trial court provided the jury with preliminary instructions, allowing them to take notes during the trial. The court had also previously admonished the jury “not [to] look up some topic on the internet, or . . . visit any social media site.”

During the first day of trial, the trial court further instructed the jury as follows regarding note-taking:

A question has been raised by a juror as to whether notes may be taken on an electronic device such as an iPad or a tablet as opposed to pen and paper. In my discretion, I will allow that. Just abide by the same instructions that I’ve given you concerning notes.

Defendant does not challenge the trial court’s decision authorizing the jurors’ use of iPads or tablet computers for note-taking purposes. *See id.* Rather, Defendant contends that the court’s instructions concerning the use of these electronic devices were fatally defective, constituting plain error, recasting as instructional error subject to plain error review a decision we otherwise would review for an abuse of discretion. *Compare id. with Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333.

To establish the requisite prejudice resulting from this alleged instructional error, Defendant requests that we take judicial notice of common features of iPads and tablet computers; for example, that these devices have the capabilities to allow their users to communicate with others, to access information, and to record. In the present case, however, even if we were to take judicial notice of the capabilities of iPads and tablet computers, such notice would not alter our conclusion regarding Defendant’s argument because our review of the record reveals no prejudice. While true that iPads and other tablet computing devices have a range of capabilities a simple pen and paper do not, the record does not even *hint* at any specific prejudice resulting from the trial court’s failure to educate the jurors more thoroughly about the wonders of the technology or to clarify or provide more detail in its instructions regarding the jurors’ use of that technology.

Based on our review of the record, we do not believe it is reasonably possible – much less reasonably probable – that the jury’s finding of guilt would have differed if the trial court’s instructions regarding note-taking had differed. Therefore, assuming, *arguendo*, that the court’s failure to instruct the jury more fully regarding the use of iPads and tablet

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computing devices constituted error, we hold that it did not constitute plain error. Accordingly, this argument is overruled.

C. Sentencing

[3] Finally, Defendant argues – and the State concedes - that the trial court erred in imposing an aggravated sentence of ten (10) years for his indecent liberties conviction and that the matter should be remanded for resentencing. However, Defendant and the State disagree as to the *scope* of the resentencing hearing. Defendant contends that this Court should instruct the trial court on remand to impose a presumptive sentence (3 years) for the indecent liberties conviction. The State, however, contends that the trial court should be free to impose an aggravated sentence (10 years) based on a proper finding of aggravating factors.

For the reasons stated below, we hold that the trial court erred in sentencing Defendant to an aggravated sentence, and we remand the matter for resentencing with instructions to the trial court to conduct further proceedings consistent with this opinion.

1. Statutory Error

Defendant first contends – and the State concedes - that the trial court committed a statutory error in imposing the sentence it did. We agree.

Alleged statutory errors present questions of law, which we review *de novo*. *State v. McLean*, ___ N.C. App. ___, ___, 753 S.E.2d 235, 238 (2014). Relevant to the present case, the sentencing regime applicable to crimes committed in North Carolina in 1989 is the Fair Sentencing Act. Under the Fair Sentencing Act, “the judge must specifically list . . . each matter in aggravation or mitigation,” and “find that the factors in aggravation outweigh the factors in mitigation” before imposing an aggravated sentence. N.C. Gen. Stat. § 15A-1340.4(b) (1989). Under the Fair Sentencing Act, indecent liberties with a child is a Class H felony with a presumptive sentence of three years and a maximum, aggravated sentence of ten years. *State v. Lawrence*, 193 N.C. App. 220, 223, 667 S.E.2d 262, 264 (2008).

Here, the indecent liberties judgment simply lists an offense date of 16 September 1989 and then purports to sentence Defendant to ten years in prison without indicating that the court considered the aggravating and mitigating factors set forth in N.C. Gen. Stat. § 15A-1340.4(a) (1989); without listing findings in aggravation or mitigation; and without making a finding that the factors found in aggravation outweighed

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those in mitigation. *See id.* § 15A-1340.4(b). This constitutes reversible error. Accordingly, we vacate the judgment imposing this sentence and remand for resentencing.

2. Scope of Resentencing Hearing on Remand

Determining the proper scope of the resentencing hearing is complicated by the fact that this case belongs to a small universe of cases which are subject to *both* the Fair Sentencing Act – *see State v. Mickey*, 347 N.C. 508, 513, 495 S.E.2d 669, 672 (1998) (stating that the Fair Sentencing Act applies to those *offenses* committed before 1 October 1994) – and the requirements flowing from the United States Supreme Court’s decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004), which apply prospectively to cases pending on direct review and not final on 24 June 2004, irrespective of the offense date. *State v. Hasty*, 181 N.C. App. 144, 146-47, 639 S.E.2d 94, 95-96 (2007).

Our resolution of the issue requires an understanding of the effect of *Blakely* on our law and its impact on our application of the Fair Sentencing Act in current prosecutions of pre-1994 crimes. The version of the Fair Sentencing Act applicable to Defendant’s indecent liberties offense committed in 1989 provides sixteen (16) factors which may be considered to enhance the punishment of a defendant convicted of certain felonies. N.C. Gen. Stat. § 15A-1340.4(a)(1) (1989). Fifteen (15) of the factors deal with characteristics of the crime of which the defendant was convicted, such as whether the crime was “especially heinous, atrocious, or cruel,” or whether the defendant was armed at the time the offense was committed. *Id.* The remaining factor is the fact of the defendant’s prior conviction for an offense punishable by more than sixty (60) days’ confinement. *Id.*

Prior to *Blakely*, it was the trial judge who determined the existence of aggravating factors by the preponderance of the evidence. *State v. Jones*, 314 N.C. 644, 648, 336 S.E.2d 385, 387-88 (1985). The aggravating factors were not considered “elemental facts” which had to be found “beyond a reasonable doubt.” *Id.* at 648, 336 S.E.2d at 388. Though the Fair Sentencing Act was replaced by the General Assembly in 1994 with the Structured Sentencing Act, it still has application to prosecutions for offenses committed prior to its repeal. *Mickey*, *supra*.

In 2004, the United States Supreme Court handed down its decision in *Blakely*. In *Blakely*, the Court held that, under the Sixth Amendment right to a jury trial, any factors which could be used to enhance a defendant’s sentence *other than the fact of prior conviction* had to be found

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beyond a reasonable doubt by a jury. 542 U.S. at 301-04, 124 S. Ct. 2536-38. In the wake of *Blakely*, based on the United States Supreme Court's previous decision in *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed.2d 649 (1987), we held that *Blakely*'s mandate applied prospectively to proceedings pending on direct appeal and not final as of 24 June 2004. *Hasty*, 181 N.C. App. at 146-47, 639 S.E.2d at 95-96. Therefore, even though the Fair Sentencing Act applies to the present proceeding – as Defendant committed the offense in 1989 – the *Blakely* mandate also applies, as the proceeding was not commenced until well after 2004.

The replacement of the Fair Sentencing Act with the Structured Sentencing Act brought a number of changes to the procedure and treatment of aggravating factors in our State, many in response to *Blakely*. See, e.g., 2005 N.C. Sess. Law 145. Under the current law, there are twenty-nine (29) aggravating factors which must be considered by a jury. N.C. Gen. Stat. § 15A-1340.16 (2013). The fact of prior conviction is still used to enhance a defendant's punishment; however, it is no longer considered an aggravating factor, but rather is used to determine a defendant's prior record level. See *id.* § 15A-1340.14.

Regarding notice, the Fair Sentencing Act did not contain any provision requiring the State to provide advance notice of its intent to seek an aggravated sentence. However, the Structured Sentencing Act, pursuant to an amendment to that Act passed by the General Assembly in response to *Blakely*, requires that the State provide a defendant with “written notice of its intent to prove the existence of” aggravating factors “at least 30 days before trial[.]” N.C. Gen. Stat. § 15A-1340.16(a6) (2013). However, this statutory notice requirement does not apply to proceedings for crimes committed prior to 30 June 2005. *State v. Henderson*, 201 N.C. App. 381, 389, 689 S.E.2d 462, 467-68 (2009).

Notwithstanding that the thirty (30) day statutory notice requirement does not apply to the current proceeding – as the offense date was in 1989 - our Supreme Court has held that under the Sixth Amendment, a defendant is otherwise entitled to “‘reasonable notice’ sufficient to ensure that [the defendant] [is] afforded an opportunity to defend against the charges [brought against him],” *State v. Hunt*, 357 N.C. 257, 271, 582 S.E.2d 593, 602 (2003) (emphasis in original), and stated that this “reasonable notice” requirement applies to aggravating factors. *Id.* at 275-76, 582 S.E.2d at 605.

In the present case, Defendant argues that his right to “reasonable notice” was violated. We do not believe Defendant's Sixth Amendment right to “reasonable notice” is violated where the State provides no prior

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notice that it seeks an enhanced sentence based on the fact of prior conviction. It *appears* from the record on appeal that this was the sole basis relied upon by the State in the initial sentencing hearing.³ Accordingly, we hold that the trial court on remand may impose an aggravated sentence on the indecent liberties conviction based on a finding by a preponderance of the evidence that Defendant had a prior conviction qualifying as an aggravating factor pursuant to N.C. Gen. Stat. § 15A-1340.4(a)(1)(o) (1989). However, if the State intends to present evidence of any aggravating factors *other than the fact of prior conviction*, we hold that it must first satisfy the trial court that it provided Defendant with constitutionally adequate notice.

III. Conclusion

We find no reversible error regarding the testimony by the victim's mother or in the instructions regarding the use of iPads or tablet computers by the jury. We hold, however, that the trial court erred by imposing an aggravated sentence for Defendant's conviction for taking indecent liberties with a child. We vacate the judgment imposing that sentence and remand the case to the trial court with instructions to conduct further proceedings consistent with this opinion.

Further, as the State points out, the trial court misidentified the class of each felony on the judgments, mistakenly identifying the class under current law rather than under 1989 law. Accordingly, on remand the trial court shall correct the Judgment and Commitment for the first degree rape offense to reflect the offense as a class "B" felony rather than a class "B1" felony; and the trial court shall correct the Judgment and Commitment for the indecent liberties offense to reflect a class "H" felony rather than a class "F" felony. *See* N.C. Gen. Stat. § 14-27.2(b) (1989); *id.* § 14-1.1(a)(2); *id.* § 14-202.1(b).

NO ERROR in part; VACATED in part; and REMANDED.

Judges BRYANT and DIETZ concur.

3. The record is not entirely clear on this point.

STATE v. SMITH

[240 N.C. App. 73 (2015)]

STATE OF NORTH CAROLINA

v.

MICQUAN SMITH

No. COA14-915

Filed 17 March 2015

Satellite-Based Monitoring—supporting evidence—sufficient

The trial court did not err by ordering defendant to be subject to Satellite-Based Monitoring where defendant contended that his prior offenses should not have been considered in the trial court's findings, but there was evidence in the record to support the remainder of the trial court's findings with respect to the age of the alleged victims, the temporal proximity of the events, and defendant's increasing sexual aggressiveness.

Appeal by defendant from judgments entered 17 March 2014 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 February 2015.

Roy Cooper, Attorney General, by Joseph Finarelli, Special Deputy Attorney General, for the State.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for defendant-appellant.

STEELMAN, Judge.

Where the trial court's additional findings of fact were supported by competent record evidence, the trial court did not err in imposing satellite-based monitoring.

I. Factual and Procedural Background

On 6 January 2014, Micquan Smith (defendant) pled guilty to indecent liberties with a minor and attempted first-degree burglary, based on offenses committed on 10 July 2013. The trial court deferred sentencing to determine whether satellite-based monitoring (SBM) was required. On 7 February 2014, the State presented evidence that in January of 2012, defendant pled guilty to assault on a child under twelve, and that in September of 2012, defendant was charged with indecent liberties with a minor and indecent exposure, although these charges were voluntarily dismissed by the State prior to trial.

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On 7 March 2014, the State presented the results of the Static-99 examination of defendant, which indicated that he had six points, and fell within the “High” risk category. One point was assigned for the January 2012 conviction, and one for the September 2012 charges. The officer who administered the examination, however, testified that she would have given defendant only five points, placing him in the “Moderate-High” risk category. The trial court found the initial examination to be in error, and that defendant’s Static-99 did not place him in the “High” risk category. The trial court then made the following findings:

Find that although the Static 99R takes into account prior convictions it does not explicitly consider the short duration between the criminal acts themselves,

That is: 1st 1-28-12 Picking up a 5 year old girl.

2nd 9-22-12 Exposure on a playground to a 5 year old, 3 year old and a 1 year female.

3rd 7-10-13 B&E physically break into a residence and commit an Indecent Liberties to wit being in bed with a young female child.

That the three evidences [sic] a pre-dereliction [sic] towards young pre-pubescent females a particularly vulnerable population.

That two of the occasions the young female children were being loosely supervised in open, public areas when approached by the defendant. In the third most recent case the defendant broke into a residential structure to gain access to the young victim. That the three incidences [sic] evidence a pattern of sexual increasing aggressiveness on the part of the defendant in his acting out with the young female victims.

Defendant was sentenced to consecutive active sentences of 23-40 months imprisonment for first-degree burglary and 15-27 months imprisonment for indecent liberties with a child. The trial court ordered that defendant be subject to SBM for 20 years following his release from prison.

Defendant appeals.

II. Standard of Review

On appeal from an order imposing SBM, “we review the trial court’s findings of fact to determine whether they are supported by competent

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record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (quoting *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004), *cert. denied*, 543 U.S. 1156, 161 L.Ed.2d 122 (2005)).

III. Findings of Fact

In his sole argument on appeal, defendant contends that the trial court's additional findings of fact are not supported by competent record evidence, and that the trial court erred in ordering defendant to be subject to SBM. We disagree.

We have held that, if the only evidence presented to the trial court is a STATIC-99 risk assessment of "Moderate," the trial court errs in imposing SBM.¹ *Kilby*, 198 N.C. App. At 369-70, 679 S.E.2d at 434. If the State presents additional evidence, and the trial court makes additional findings, then the trial court may order SBM. *State v. Morrow*, 200 N.C. App. 123, 132, 683 S.E.2d 754, 761 (2009).

The trial court's findings state that: (1) defendant committed multiple acts, (2) they were close together in time, (3) that all of the subjects of the incidents were young girls, (4) that two of the incidents involved public places, and one involved breaking into a private residence, and (5) that the incidents show that defendant's aggressive conduct was escalating.

Defendant contends that his prior offenses should not have been considered at all in the trial court's findings. We have previously held that the trial court is not to consider matters already included in the STATIC-99 assessment:

The purpose of allowing the trial court to make additional findings is to permit the trial court to consider factors not part of the STATIC-99 assessment. In *Morrow*, we held that, where an offender is determined to pose only a low or moderate risk of reoffending, the State must offer additional evidence, and the trial court make additional findings, in order to justify a maximum SBM sentence. *See Morrow*, 200 N.C. App. at 132, 683 S.E.2d at 761; *Jarvis*, ___ N.C. App. at ___, 715 S.E.2d at 259. To allow these

1. We note that the STATIC-99 risk assessment has four categories: Low, Moderate-Low, Moderate-High, and High. We hold that Moderate-High still constitutes "Moderate" for the purposes of our precedent.

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“additional findings” to include matters already addressed in the STATIC-99 assessment would obviate the utility of the assessment. We hold that these “additional findings” cannot be based upon factors explicitly considered in the STATIC-99 assessment.

State v. Thomas, ___ N.C. App. ___, ___, 741 S.E.2d 384, 387 (2013). Even assuming *arguendo* that the charges from January and September 2012 were otherwise admissible, they were part of the STATIC-99 assessment, and the trial court was not permitted to rely upon them as factors in its final determination on the appropriateness of SBM. Further, we note that the September 2012 charges were dismissed; we have previously held that mere accusations of crimes, absent a conviction, “are generally inadmissible even if evidence that [the witness] actually committed the crimes would have been admissible.” *State v. Johnson*, 128 N.C. App. 361, 369, 496 S.E.2d 805, 810 (1998) (quoting *State v. Mills*, 332 N.C. 392, 407, 420 S.E.2d 114, 121 (1992)). As such, even in the absence of the STATIC-99, the September 2012 charges could not have been relied upon by the trial court.

However, there was evidence in the record to support the remainder of the trial court’s findings, with respect to the age of the alleged victims, the temporal proximity of the events, and defendant’s increasing sexual aggressiveness. We have held that “when the trial court is making its determination of whether the defendant requires the highest possible level of supervision, the court ‘is not limited to the DOC’s risk assessment’ and should consider ‘any proffered and otherwise admissible evidence relevant to the risk posed by a defendant[.]’” *State v. Green*, 211 N.C. App. 599, 603, 710 S.E.2d 292, 295 (2011) (quoting *Morrow*, 200 N.C. App. at 131, 683 S.E.2d at 760-61). These factors were not part of the STATIC-99 evaluation, and the trial court was not barred from considering them. We hold that the trial court did not err in considering this evidence, making findings of fact based on this evidence, and imposing the requirement of post-sentence SBM.

Because the trial court made additional findings of fact that were supported by competent record evidence, we hold that it did not err in ordering defendant to be subject to SBM following his release from incarceration.

AFFIRMED.

Judges DIETZ and INMAN concur.

STATE v. WAINWRIGHT

[240 N.C. App. 77 (2015)]

STATE OF NORTH CAROLINA

v.

JAMIE COLE WAINWRIGHT

No. COA14-1036

Filed 17 March 2015

1. Motor Vehicles—driving while impaired—pretrial motion to quash unsigned citation

The trial court did not err by denying defendant's pretrial motion to quash the citation which charged him with driving while impaired even though he did not sign the citation and the officer did not certify the delivery of the citation as mandated by N.C.G.S. § 15A-302(d) (2013). By the plain language of the statute, the officer was only required to sign and date the document if defendant refused to sign.

2. Motor Vehicles—driving while impaired—failure to reduce order—not required to enter written order

The trial court did not err in a driving while impaired case by failing to reduce the order denying defendant's motion to suppress to writing, and by allegedly failing to include specific findings of fact and conclusions of law. If the trial court provides the rationale for its ruling from the bench and there are no material conflicts in the evidence, the court is not required to enter a written order.

3. Search and Seizure—motion to suppress evidence—investigatory stop of vehicle—probable cause

The trial court did not err in a driving while impaired case by denying defendant's motion to suppress evidence obtained during an investigatory stop of his vehicle. The officer had probable cause to conduct an investigatory stop. Defendant swerved outside the lane of travel and almost struck the curb at 2:37 a.m. in an area with heavy pedestrian traffic and within close proximity to bars and nightclubs.

Appeal by defendant from judgment entered 26 March 2014 by Judge Alma L. Hinton in Pitt County Superior Court. Heard in the Court of Appeals 18 February 2015.

Attorney General Roy Cooper, by Assistant Attorney General J. Aldean Webster III, for the state.

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The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant.

TYSON, Judge.

Defendant appeals from the denial of his motions to suppress the investigatory stop of his vehicle and to quash the citation charging him with driving while impaired. We affirm.

I. Background

Officer Chad Edwards was on duty in the early Sunday morning hours of 12 August 2007. Officer Edwards had four years of experience as a police officer, and had been employed by the East Carolina University Police Department for nearly a year. At approximately 2:37 a.m., Officer Edwards was standing beside his patrol car in the driveway of the Chancellor's residence on East Fifth Street. The Chancellor's residence is located directly across the street from the East Carolina University campus, three to four blocks from downtown Greenville. There are numerous bars and nightclubs located in the downtown area. The area around the Chancellor's residence is mostly comprised of student housing.

Officer Edwards was speaking with two women when he observed a grey Jeep Cherokee traveling toward downtown on East Fifth Street. The Jeep swerved to the right, crossed the white line marking the outside lane of travel, and almost hit the curb. The vehicle continued on East Fifth Street, and Officer Edwards observed nothing else unusual about the vehicle.

Officer Edwards testified he was concerned the vehicle would swerve again and strike a pedestrian. He stated pedestrian traffic in this immediate area was much heavier than normal. Students had moved back onto campus, but had not resumed their classes. The bars and nightclubs had stopped serving alcohol at 2:00 a.m., shortly before Officer Edwards observed the Jeep. Officer Edwards testified that one of the nightclubs located downtown has a capacity of 800 patrons, and it generally operated at full capacity on a Saturday night. About a dozen other establishments in the area serve alcohol. Many pedestrians were walking along the sidewalks on their way home from the bars and nightclubs in the downtown area. Officer Edwards testified some pedestrians were walking in the bicycle lane, and it was not unusual to observe some pedestrians walking in the road.

After he observed the grey Jeep swerve, Officer Edwards left the Chancellor's driveway and pulled into the roadway behind the vehicle.

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He activated his blue lights and initiated a traffic stop. Officer Edwards, along with two other police officers, determined defendant, the driver, was impaired and arrested him. Defendant was transported to the Pitt County Detention Center and administered an Intoxilyzer test to determine his blood alcohol concentration. The Intoxilyzer test revealed a blood alcohol concentration of .11.

Defendant was tried before the Pitt County District Court on 12 November 2013, and was convicted of driving while impaired. He appealed the conviction to Pitt County Superior Court. Prior to trial, the Superior Court denied defendant's motion to suppress evidence obtained from the traffic stop and to quash the citation.

The case was tried before a jury and defendant was convicted of driving while impaired. The trial court found aggravating factors of a prior driving while impaired conviction within seven years, and defendant was driving with a revoked license at the time of his arrest. He was sentenced as a Level 1 offender to a term of eighteen months of supervised probation, and was ordered to serve an active term of thirty days in prison. Defendant appeals.

II. Issues

Defendant argues the trial court: (1) lacked jurisdiction to enter judgment on his driving while impaired conviction, because defendant did not sign the citation to acknowledge receipt and Officer Edwards did not certify delivery of the citation; (2) failed to enter a written order on the denial of his motion to suppress; and, (3) erred in denying his motion to suppress, because Officer Edwards did not form a reasonable articulable suspicion that defendant was impaired.

III. Motion to Quash the Citation

[1] Defendant asserts the trial court erred by denying his pretrial motion to quash the citation, which charged him with driving while impaired, because he did not sign the citation and Officer Edwards did not certify the delivery of the citation as mandated by N.C. Gen. Stat. § 15A-302(d) (2013). He argues Officer Edwards's failure to follow the procedure set forth in the statute for service of a citation divested the court of jurisdiction to enter judgment on his conviction for driving while impaired. We disagree.

a. Standard of Review

"An alleged error in statutory interpretation is an error of law, and thus our standard of review for this question is *de novo*." *Armstrong v. N.C. State Bd. of Dental Examiners*, 129 N.C. App. 153, 156, 499 S.E.2d

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462, 466 (1998) (citations omitted). This Court also reviews challenges to the jurisdiction of the trial court under a *de novo* standard. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks omitted).

b. Statutory Requirements for Service of a Citation

“An officer may issue a citation to any person who he has probable cause to believe has committed a misdemeanor or infraction.” N.C. Gen. Stat. § 15A-302(b) (2013). The citation must:

- (1) Identify the crime charged, including the date, and where material, identify the property and other persons involved,
- (2) Contain the name and address of the person cited, or other identification if that cannot be ascertained,
- (3) Identify the officer issuing the citation, and
- (4) Cite the person to whom issued to appear in a designated court, at a designated time and date.

N.C. Gen. Stat. § 15A-302(c) (2013). The issuance of a citation requires the person to appear in court and answer a misdemeanor or infraction charge or charges, or waive his appearance. N.C. Gen. Stat. § 15A-302(a) (2013).

The manner of service of a citation is governed by N.C. Gen. Stat. § 15A-302(d), which provides:

A copy of the citation shall be delivered to the person cited who may sign a receipt on the original which shall thereafter be filed with the clerk by the officer. If the cited person refuses to sign, the officer shall certify delivery of the citation by signing the original, which shall thereafter be filed with the clerk. Failure of the person cited to sign the citation shall not constitute grounds for his arrest or the requirement that he post a bond.

N.C. Gen. Stat. § 15A-302(d) (2013) (emphasis supplied).

The citation form includes a signature box for the defendant to sign to acknowledge receipt of a copy of the citation. The citation issued in this case is included in the record and does not bear defendant’s signature. The citation form does not include an additional place for the

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officer to sign, in the event the defendant refuses to sign for receipt of the document. Officer Edwards signed the citation, as issuing officer, pursuant to N.C. Gen. Stat. § 15A-301(a) (2) (2013). (“The citation must be signed and dated by the law-enforcement officer who issues it.”).

The record indicates defendant was provided with a copy of the charges when he was brought before the magistrate. The Magistrate’s Order, included on the citation, states defendant was arrested without a warrant, there is probable cause for the arrest, and that a copy of the order was delivered to defendant. The magistrate signed the order on 12 August 2007, the day of defendant’s arrest.

Defendant argues that § 15A-302(d) requires Officer Edwards to have signed the citation a second time, because defendant did not sign to acknowledge receipt of a copy. We disagree.

“When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.” *State v. Jackson*, 353 N.C. 495, 501, 546 S.E.2d 570, 574 (2001) (quotation and citation omitted). The language of this statute is plain and unambiguous. The statute requires the officer to deliver a copy of the citation to the person charged. N.C. Gen. Stat. § 15A-302(d) (2013). The accused may, but is not required to, sign the original citation to acknowledge receipt. *Id.* By the plain language of the statute, the officer is only required to sign and date the document if the defendant refuses to sign. *Id.* While the practice of some officers is to write “refused to sign” or some other notation, if defendant refuses or is unable to sign the citation, this notation is not required by the statute.

Here, there is no evidence defendant refused to sign the citation. Defendant’s motion to quash alleges he “was not requested to sign, and did not sign acknowledging receipt” of a copy of the citation. Even if the absence of defendant’s signature on the citation was a conscious refusal, defendant has failed to show Officer Edwards failed to follow the procedure set forth in N.C. Gen. Stat. § 15A-302(d). Defendant’s argument is overruled.

IV. Requirement of a Written Order

[2] Defendant argues the trial court erred by failing to reduce the order, denying his motion to suppress to writing, and by failure to include specific findings of fact and conclusions of law. We disagree.

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a. Standard of Review

In ruling on a motion to suppress, “[t]he judge must set forth in the record his findings of facts and conclusions of law.” N.C. Gen. Stat. § 15A-977(f) (2013). “This statute has been interpreted as mandating a written order unless (1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing.” *State v. Williams*, 195 N.C. App. 554, 555, 673 S.E.2d 394, 395 (2009) (citing *State v. Shelly*, 181 N.C. App. 196, 205, 638 S.E.2d 516, 523, *disc. review denied*, 361 N.C. 367, 646 S.E.2d 768 (2007)).

In reviewing the trial court’s failure to set forth written findings of fact and conclusions of law, the appropriate standard of review is as follows:

The trial court’s ruling on the motion to suppress is fully reviewable for a determination as to whether the two criteria set forth in *Williams* have been met — (1) whether the trial court provided the rationale for its ruling on the motion to suppress from the bench; and (2) whether there was a material conflict in the evidence presented at the suppression hearing. If a reviewing court concludes that both criteria are met, then the findings of fact are implied by the trial court’s denial of the motion to suppress, . . . and shall be binding on appeal if supported by competent evidence If a reviewing court concludes that either of the criteria is not met, then a trial court’s failure to make findings of fact and conclusions of law, contrary to the mandate of section 15A-977(f), is fatal to the validity of its ruling and constitutes reversible error.

State v. Baker, 208 N.C. App. 376, 381-82, 702 S.E.2d 825, 829 (2010) (citations omitted).

b. Sufficiency of the Order

At the conclusion of the evidentiary hearing on defendant’s motion to suppress, the court concluded: “After hearing arguments of [c]ounsel and reviewing the summary presented by [d]efense counsel, the Court finds that Officer Edwards had a reasonable suspicion to stop and denies the [d]efendant’s motion.” Defense counsel requested the court to “actually enter an order with the findings of facts and conclusions of law.” The record does not indicate the court made any further findings of fact or conclusions of law to support the denial of defendant’s motion to suppress, or that it entered a written order.

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When ruling on a motion to suppress, our Supreme Court has recognized the importance of the trial court to establish a record, which allows for meaningful appellate review. “[I]t is always the better practice to find all facts upon which the admissibility of the evidence depends.” *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980). If the trial court provides the rationale for its ruling from the bench and there are no material conflicts in the evidence, the court is not required to enter a written order. *Williams*, 195 N.C. App. at 555, 673 S.E.2d at 395. “If these two criteria are met, the necessary findings of fact are implied from the denial of the motion to suppress.” *Id.* “If there is not a material conflict in the evidence, it is not reversible error to fail to make such findings because we can determine the propriety of the ruling on the undisputed facts which the evidence shows.” *State v. Lovin*, 339 N.C. 695, 706, 454 S.E.2d 229, 235 (1995).

Here, the trial court ruled from the bench on defendant’s motion to suppress. *See Williams*, 195 N.C. App. at 555, 673 S.E.2d at 394 (holding an order denying motion to suppress sufficient in the absence of a written order where the court ruled from the bench and there were no material conflicts in the evidence). Upon a full review of the transcript and record, we find no material conflicts in the evidence presented at the hearing on defendant’s motion to suppress. When asked by the court whether defendant wished to put forth evidence, defendant responded that he did not.

Officer Edwards was the only witness to testify. Defendant does not cite any material conflicts in his testimony. “We, therefore, infer that the trial court made the findings necessary to support the denial of the motion to suppress.” *Id.* The record is sufficient to permit appellate review of the denial of defendant’s motion to suppress. Defendant’s argument is overruled.

V. Motion to Suppress

[3] Defendant asserts the trial court erred by denying his motion to suppress and argues Officer Edwards was without probable cause to conduct an investigatory stop of his vehicle. We disagree.

a. Standard of Review

The standard of review for a motion to suppress “is whether the trial court’s findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law.” *State v. Cockerham*, 155 N.C. App. 729, 736, 574 S.E.2d 694, 699 (citations and quotations omitted), *disc. review denied*, 357 N.C. 166, 580 S.E.2d 702 (2003).

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“The court’s findings ‘are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.’” *Id.* (quoting *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001)). “[T]he trial court’s ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence.” *State v. McClendon*, 130 N.C. App. 368, 377, 502 S.E.2d 902, 908 (1998), *aff’d*, 350 N.C. 630, 517 S.E.2d 128 (1999).

b. Reasonable Suspicion

“A police officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may be underway.” *State v. Barnard*, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007), *aff’d*, 362 N.C. 244, 658 S.E.2d 643, *cert. denied*, 555 U.S. 914, 172 L. Ed. 2d 198, 129 S. Ct. 264 (2008). “The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.” *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968)).

The reasonable suspicion standard is a “less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.” *Barnard*, 362 N.C. at 247, 658 S.E.2d at 645. (citation and quotation marks omitted). “Factors supporting reasonable suspicion are not to be viewed in isolation.” *State v. Campbell*, 188 N.C. App. 701, 706, 656 S.E.2d 721, 725, *appeal dismissed*, 362 N.C. 364, 664 S.E.2d 311 (2008). Rather, reasonable suspicion exists when “the totality of the circumstances – the whole picture” supports the inference that a crime has been or is about to be committed. *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 440 (2008).

c. Swerving / Weaving

Officer Edwards observed defendant’s vehicle at approximately 2:37 a.m. on a Sunday morning. Defendant was driving in an area comprised mainly of student housing, located three or four blocks from downtown and numerous bars and nightclubs. Those establishments stop serving alcohol at 2:00 a.m. Pedestrian traffic was heavy when Officer Edwards observed defendant driving.

Students were leaving the bars and nightclubs in downtown Greenville and were walking back to their dormitories or residences. Officer Edwards estimated that 100 or more students were walking from downtown to their residences between 2:00 and 3:00 a.m. Some

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pedestrians were walking on the sidewalks and others were walking on the paved portion of the street.

Officer Edwards initiated the stop of defendant's vehicle based solely on his observation of defendant's "swerving" or "weaving" on a single occasion. While defendant was traveling down Fifth Street toward downtown, Officer Edwards observed him swerve to the right. Defendant's vehicle crossed the white line that marked the outside lane of travel and came within inches of the curb. Officer Edwards testified he was concerned defendant would swerve again and strike pedestrians.

This Court has determined that weaving within the lane of travel, standing alone, is insufficient to justify a traffic stop without the existence of additional facts to indicate the driver is impaired.

[W]eaving can contribute to a reasonable suspicion of driving while impaired. However, in each instance, the defendant's weaving was coupled with additional specific articulable facts, which also indicated that the defendant was driving while impaired. *See, e.g., State v. Aubin*, 100 N.C. App. 628, 397 S.E.2d 653 (1990) (weaving within lane, plus driving only forty-five miles per hour on the interstate), *appeal dismissed, disc. review denied*, 328 N.C. 334, 402 S.E.2d 433, *cert. denied*, 502 U.S. 842, 116 L. Ed. 2d 101 (1991); *State v. Jones*, 96 N.C. App. 389, 386 S.E.2d 217 (1989) (weaving towards both sides of the lane, plus driving twenty miles per hour below the speed limit), *appeal dismissed, disc. review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990); *State v. Adkerson*, 90 N.C. App. 333, 368 S.E.2d 434 (1988) (weaving within lane five to six times, plus driving off the road); *State v. Thompson*, 154 N.C. App. 194, 571 S.E.2d 673 (2002) (weaving within lane, plus exceeding the speed limit).

State v. Fields, 195 N.C. App. 740, 744, 673 S.E.2d 765, 768, *disc. review denied*, 363 N.C. 376, 679 S.E.2d 390 (2009).

Weaving, standing alone, "can be sufficient to arouse a reasonable suspicion of criminal activity when it is particularly erratic and dangerous to other drivers." *State v. Derbyshire*, __ N.C. App. __, __, 745 S.E.2d 886, 892 (2013), *disc. review denied*, __ N.C. __, 753 S.E.2d 785 (2014). *See also State v. Fields*, 219 N.C. App. 385, 723 S.E.2d 777 (2012) (officer had reasonable suspicion where defendant's weaving within his lane was so erratic that other drivers were maneuvering to avoid his car).

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Under the totality of the circumstances, defendant's driving was dangerous to others due to the pedestrian traffic on the sidewalks and street as Officer Edwards described in his testimony. *Derbyshire*, __ N.C. App. __, 745 S.E.2d at 891. The undisputed evidence shows many pedestrians in the area at the time Officer Edwards observed defendant swerve right, cross the line marking the outside of his lane of travel and almost strike the curb.

d. Time and Place Factors

A defendant's driving at an unusual hour and his proximity to establishments that serve alcohol are additional factors the court can consider to determine whether the officer had reasonable suspicion to effectuate the stop. *Id.* (citing *Fields*, 195 N.C. App. at 744, 673 S.E.2d at 768). In *State v. Jacobs*, 162 N.C. App. 251, 255, 590 S.E.2d 437, 440-41 (2004), the defendant's weaving within his lane at 1:43 a.m. in an area near bars was sufficient to establish a reasonable suspicion of driving while impaired. Similarly, in *State v. Watson*, 122 N.C. App. 596, 599-600, 472 S.E.2d 28, 30 (1996), this Court upheld the trial court's finding of reasonable suspicion where the defendant was weaving within his lane and driving on the dividing line of the highway at 2:30 a.m. on a road near a nightclub.

The trial court is to consider "the totality of the circumstances – the whole picture" in determining whether the officer had a reasonable suspicion of impaired driving. *Styles*, 362 N.C. at 414, 665 S.E.2d at 440; *Campbell*, 188 N.C. App. at 706, 656 S.E.2d at 725. The swerving nature of defendant's driving outside the lane of travel and nearly striking the curb, the pedestrian traffic along the sidewalks and in the roadway, the unusual hour defendant was driving, and his proximity to bars and nightclubs, supports the trial court's conclusion that Officer Edwards had reasonable suspicion to believe defendant was driving while impaired. Defendant's argument is overruled.

VI. Conclusion

The trial court properly denied defendant's motion to quash the citation, where the officer signed as issuing the citation. Defendant presented no evidence he refused to sign the citation. N.C. Gen. Stat. § 15A-302(d). The record shows the magistrate signed and provided defendant with a copy of the charges.

In the absence of a written order, the record is sufficient to permit appellate review of the denial of defendant's motion to suppress. The trial court pronounced its ruling from the bench and no material conflicts exist in the evidence presented at the hearing.

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The trial court properly denied defendant's motion to suppress. The officer had probable cause to conduct an investigatory stop of defendant's vehicle. Defendant swerved outside the lane of travel and almost struck the curb at 2:37 a.m. in an area with heavy pedestrian traffic and within close proximity to bars and nightclubs. The orders of the trial court denying defendant's motions to quash and motion to suppress are affirmed.

Affirmed.

Judges STEPHENS and HUNTER, JR. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 MARCH 2015)

CRIDER v. CATTIE No. 14-603	Mecklenburg (10CVS9704)	Affirmed
FIRST CITIZENS BANK, NA v. L & M REALTY & INV. PROP, INC. No. 14-718	Franklin (11CVD789)	Affirmed
IN RE C.E. No. 14-911	Forsyth (12JT162)	Affirmed
IN RE L.E. No. 14-1105	New Hanover (14JA16)	Affirmed
IN RE L.S.T. No. 14-1000	Haywood (14JA19-20)	Affirmed
IN RE S.C.B. No. 14-891	Cumberland (09JT553-554)	Affirmed
IN RE W.L.C. No. 14-950	Randolph (12JT61)	Affirmed
JONES v. JONES No. 14-236	Lee (12CVD442)	Affirmed
JONES v. JONES No. 14-507	Lee (13CVD817)	Affirmed
MASON v. CLINE No. 14-939	Catawba (11CVS861)	Reversed
MOORE v. McLAUGHLIN No. 14-967	Union (10CVD2518)	Affirmed and Remanded
STATE v. ALLEN No. 14-1253	Alamance (04CRS54678-79)	Reversed
STATE v. ASHFORD No. 14-882	Union (80CRS2109) (80CRS3175)	Affirmed
STATE v. ASKEW No. 14-411	Wake (12CRS212660)	Affirmed

STATE v. AVERY No. 14-988	Johnston (12CRS57334) (13CRS476)	No Error
STATE v. BRICE No. 14-1173	Catawba (09CRS54530-32)	Affirmed
STATE v. CLARK No. 14-637	Nash (12CRS53441)	No Error
STATE v. CURRY No. 14-1092	Mecklenburg (13CRS202638) (13CRS202640)	No Error
STATE v. DAVIS No. 14-1060	Sampson (13CRS52851) (14CRS46)	No Error
STATE v. FALLENBECK No. 14-1061	Mecklenburg (10CRS36987)	No Error
STATE v. FRASIER No. 14-894	Wilson (13CRS51468)	No Error
STATE v. GOVAN No. 14-999	Randolph (07CRS56709)	No Error
STATE v. HAMILTON No. 14-1005	Halifax (13CRS51640) (13CRS51694-95)	No Error in Part; Vacated and Remanded in Part; and New Trial in Part.
STATE v. HARDEN No. 14-970	Guilford (13CRS24704) (13CRS85908) (13CRS85912-14) (13CRS85916)	No prejudicial error
STATE v. HINSON No. 14-1112	Forsyth (13CRS12118) (13CRS53402)	No Error
STATE v. HOPPER No. 14-1130	Cleveland (02CRS56601-02)	Reversed
STATE v. ISENHOUR No. 14-1074	Cleveland (13CRS52746-47)	No Error
STATE v. JONES No. 14-799	Wake (12CRS207459)	No Error

STATE v. JORDAN No. 14-931	New Hanover (11CRS53884-85)	Vacated and Remanded
STATE v. JOYNER No. 14-957	Wayne (12CRS54615)	No Error
STATE v. LAFOUCADE No. 14-820	New Hanover (13CRS50091) (13CRS50117)	No Error
STATE v. MARSHALL No. 14-994	Wake (12CRS225100)	No Error
STATE v. MORRIS No. 14-1062	Halifax (13CRS53768)	Affirmed
STATE v. MURPHY No. 14-474	Nash (12CRS50961)	Vacated in part; remanded for resentencing in part
STATE v. OWENS No. 14-1103	Wake (04CRS47981-82) (04CRS47984-85)	Affirmed
STATE v. PHILEMON No. 14-491	Randolph (11CRS51515-17)	No error in part and reversed in part.
STATE v. PRICE No. 14-1054	Greene (13CRS153)	Reversed and Remanded
STATE v. RAMSEY No. 14-1095	Orange (11CRS53706) (12CRS50303)	Affirmed
STATE v. REXACH No. 14-1012	Onslow (10CRS53088) (10CRS53504) (10CRS57014-15)	Affirmed
STATE v. ROMERO No. 14-884	Forsyth (09CRS57873)	Affirmed
STATE v. RUFFIN No. 14-995	Wilson (10CRS4123)	Dismissed without prejudice
STATE v. WHITE No. 14-895	Forsyth (11CRS56748) (12CRS777)	No error in part, judgment arrested in part, and remanded for resentencing.

STATE v. WORTH
No. 14-959

Rowan
(09CRS4712)
(09CRS50188)

No Error

WILLIAMS v. BEST CARTAGE, INC.
No. 14-821

N.C. Industrial
Commission
(X68962)

Affirmed

AH N.C. OWNER LLC v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[240 N.C. App. 92 (2015)]

AH NORTH CAROLINA OWNER LLC D/B/A THE HERITAGE OF RALEIGH, PETITIONER

v.

N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT, AND HILLCREST CONVALESCENT CENTER, INC.; E.N.W., LLC AND BELLAROSE NURSING AND REHAB CENTER, INC.; LIBERTY HEALTHCARE PROPERTIES OF WEST WAKE COUNTY, LLC, LIBERTY COMMONS NURSING AND REHABILITATION CENTER OF WEST WAKE COUNTY, LLC, LIBERTY HEALTHCARE PROPERTIES OF WAKE COUNTY LLC, AND LIBERTY COMMONS NURSING AND REHABILITATION CENTER OF WAKE COUNTY, LLC; AND BRITTHAVEN, INC. AND SPRUCE LTC GROUP, LLC, RESPONDENT-INTERVENORS

HILLCREST CONVALESCENT CENTER, INC., PETITIONER

v.

N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT, AND E.N.W., LLC AND BELLAROSE NURSING AND REHAB CENTER, INC.; LIBERTY HEALTHCARE PROPERTIES OF WEST WAKE COUNTY, LLC, LIBERTY COMMONS NURSING AND REHABILITATION CENTER OF WEST WAKE COUNTY, LLC, LIBERTY HEALTHCARE PROPERTIES OF WAKE COUNTY LLC, AND LIBERTY COMMONS NURSING AND REHABILITATION CENTER OF WAKE COUNTY, LLC; BRITTHAVEN, INC. AND SPRUCE LTC GROUP, LLC; AND AH NORTH CAROLINA OWNER LLC D/B/A THE HERITAGE OF RALEIGH, RESPONDENT-INTERVENORS

LIBERTY HEALTHCARE PROPERTIES OF WEST WAKE COUNTY, LLC, LIBERTY COMMONS NURSING AND REHABILITATION CENTER OF WEST WAKE COUNTY, LLC, LIBERTY HEALTHCARE PROPERTIES OF WAKE COUNTY LLC, AND LIBERTY COMMONS NURSING AND REHABILITATION CENTER OF WAKE COUNTY, LLC, PETITIONER

v.

N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT AND HILLCREST CONVALESCENT CENTER, INC.; E.N.W., LLC AND BELLAROSE NURSING AND REHAB CENTER, INC.; BRITTHAVEN, INC. AND SPRUCE LTC GROUP, LLC; AND AH NORTH CAROLINA OWNER LLC D/B/A THE HERITAGE OF RALEIGH, RESPONDENT-INTERVENORS

No. COA13-1126

Filed 7 April 2015

1. Hospitals and Other Medical Facilities—certificate of need—review of existing services

In certificate of need cases, one of the criterion (Criterion 20) to be considered by the North Carolina Department of Health and Human Services (“the Agency”) is whether quality health care has been provided in the past by an applicant already involved in the

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provision of health services. Historically, the Agency has confined its review geographically and temporally. The governing statute, N.C.G.S. § 131E-183(a)(20), does not provide guidance and the Agency's interpretation is entitled to deference if reasonable, but its weight depends on the Agency's thoroughness and "all those factors which give it power to decide."

2. Hospitals and Other Medical Facilities—certificate of need—geographical scope of review

In a certificate of need case, an administrative law judge correctly concluded that the interpretation of Criterion 20 (geographic scope of application review) by the North Carolina Department of Health and Human Services (the Agency) was not based on a permissible construction of N.C.G.S. § 131E-183(a). The Agency's practice of only examining an applicant's quality of care record within the service area of the proposed project is longstanding and so warrants greater deference, but it must still be a permissible construction of the statute. Here, Agency employees were unable to identify a plausible justification for its past interpretation of the geographic scope element of Criterion 20, and there is no logical basis for disregarding information evidencing quality of care on a statewide level. Indeed such a policy actually contravenes one of the primary purposes of the certificate of need laws.

3. Hospitals and Other Medical Facilities—certificate of need—application—look back period

An administrative law judge correctly determined that the North Carolina Department of Health and Human Services' (the Agency) interpretation of the certificate of need law was not entitled to deference with regard to a look back period for providers already in North Carolina. The Agency required that the application include past activities for the 18 months prior to the application, but it only looked at the 18-month period prior to the decision. The Agency is prohibited by N.C.G.S. § 131E-182(b) from requiring an applicant to furnish more than is necessary for it to determine consistency with applicable standards, plans, and criteria, and the record is devoid of any explanation from the Agency for its practice of deviating from the time period in its own application process.

4. Hospitals and Other Medical Facilities—certificate of need—evidence of quality of care in other facilities

In a certificate of need proceeding, there was no evidence in the record to warrant a finding that an applicant purposely excluded evidence of the quality of care in the applicant's other facilities.

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5. Hospitals and Other Medical Facilities—certificate of need—findings and conclusions—quality of care record

An administrative law judge's (ALJ) failure to make findings and conclusions concerning a certificate of need applicant's actual record of providing care was an error of law, rendering his conclusion of nonconformity arbitrary and capricious. A remand was necessary so that the ALJ could make a substantive determination of whether Britthaven was in conformity with Criterion 20 based on its actual quality of care record.

6. Hospitals and Other Medical Facilities—certificate of need—application criteria—reasoning behind conclusion

The Court of Appeals could not determine whether an administrative law judge erred by concluding that Liberty's application for a certificate of need was in conformity with the Department of Health and Human Services' Criterion 20. The final decision provided no substantive explanation of how this conclusion was reached and, indeed, came to logically inconsistent conclusions.

7. Hospitals and Other Medical Facilities—certificate of need—application criteria—agency interpretation

An administrative law judge's determination in a certificate of need proceeding that The Heritage conformed with the Department of Health and Human Services' (the Agency) Criterion 13(c) was reversed. An agency's interpretation of the statutes it is charged with administering is due deference when its interpretation is reasonable, and the amount of deference given to the agency interpretation depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade. Here, the Agency's method of assessing conformity with Criterion 13(c) was reasonable, based on facts and inferences within the specialized knowledge of the Agency, and therefore entitled to deference.

Appeal by respondent and cross-appeals by petitioner AH North Carolina Owner LLC d/b/a The Heritage of Raleigh and respondent-intervenor from Final Decision entered 20 June 2013 by Administrative Law Judge Augustus B. Elkins, II in the Office of Administrative Hearings. Heard in the Court of Appeals 23 April 2014.

Parker Poe Adams & Bernstein LLP, by Renee J. Montgomery, Robert A. Leandro, and Dac Cannon, for petitioner The Heritage.

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Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Lee M. Whitman, and Tobias S. Hampson, for petitioner Liberty.

Roy Cooper, Attorney General, by June S. Ferrell, Special Deputy Attorney General, for respondent DHHS.

Smith Moore Leatherwood LLP, by Marcus C. Hewitt and Elizabeth Sims Hedrick, for respondent-intervenor Britthaven.

DAVIS, Judge.

North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section (“the Agency”); AH North Carolina Owner LLC d/b/a The Heritage of Raleigh (“The Heritage”); and Britthaven, Inc. and Spruce LTC Group, LLC (collectively “Britthaven”) appeal from the Final Decision of the administrative law judge awarding a certificate of need (“CON”) to Liberty Healthcare Properties of West Wake County, LLC, Liberty Commons Nursing and Rehabilitation Center of West Wake County, LLC, Liberty Healthcare Properties of Wake County LLC, and Liberty Commons Nursing and Rehabilitation Center of Wake County, LLC (collectively “Liberty”) and denying Britthaven’s and The Heritage’s applications for a CON. After careful review, we vacate and remand for further proceedings consistent with this opinion.

Factual Background

In the 2011 State Medical Facilities Plan (“SMFP”), the North Carolina State Health Coordinating Council identified a need for 240 additional nursing facility beds in Wake County. In response to this need determination, The Heritage, Britthaven, Liberty, Hillcrest Convalescent Center, Inc. (“Hillcrest”), E.N.W., LLC and BellaRose Nursing and Rehab Center (collectively “BellaRose”), and 11 other applicants¹ applied for a CON with the Agency to either expand their existing facilities or build new facilities in order to provide the additional beds.

The Heritage submitted an application to expand the campus of its existing senior living community to add a 90-bed nursing facility. Britthaven filed an application that proposed the development of a new

1. These additional 11 applicants were not parties in the contested case in the Office of Administrative Hearings (“OAH”) and are not relevant to the present appeal.

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120-bed nursing facility in the Brier Creek area. Hillcrest also sought in its CON application to develop a new 120-bed nursing facility. Liberty's application proposed the development of a 130-bed nursing facility in North Raleigh, comprised of 120 new nursing care beds and 10 beds relocated from its Capital Nursing Rehabilitation Center location. BellaRose's application entailed the development of a 100-bed nursing facility on Rock Quarry Road in Raleigh.

In September 2011, the Agency began conducting a competitive review of each of the applications, and on 3 February 2012, it issued its findings and conclusions. The Agency determined that the applications of The Heritage, Hillcrest, and Liberty failed to conform to all applicable statutory review criteria and, therefore, could not be approved. The Agency approved the applications of Britthaven and BellaRose and awarded certificates of need to them for 120 and 100 nursing care beds, respectively.²

The Heritage, Hillcrest, and Liberty each filed a petition for a contested case hearing challenging the Agency's decision. The Heritage's petition challenged the Agency's decision to disapprove its application and to approve the applications of Britthaven and BellaRose. Hillcrest's petition challenged the disapproval of its application and the approval of the applications of Britthaven and BellaRose. Liberty's petition challenged the disapproval of its application and the approval of Britthaven's application but did not challenge the approval of BellaRose's application.

Britthaven and BellaRose both intervened in the contested cases of The Heritage, Hillcrest, and Liberty. The Heritage, Hillcrest, and Liberty each intervened in the contested cases of the other petitioners. The parties filed a joint motion to consolidate the contested cases, and on 2 July 2012, Administrative Law Judge Augustus B. Elkins, II ("the ALJ") entered an order consolidating the cases for hearing.

The ALJ heard the matter beginning on 1 October 2012. On 20 June 2013, the ALJ entered a final decision ("the Final Decision") affirming the Agency's award of a CON to BellaRose, reversing the Agency's award of a CON to Britthaven, and reversing the Agency's denial of a CON to Liberty. The Final Decision also upheld the Agency's denial of a CON

2. The Agency also awarded a CON to Universal Properties/Fuquay Varina, LLC and Universal Health Care/Fuquay Varina, Inc. (collectively "Universal") to add 20 nursing care beds to its existing nursing care facility. The Agency's decision to approve the 20 additional beds for Universal was not at issue in the contested case and is not an issue in this appeal.

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to The Heritage and Hillcrest. The Agency, The Heritage, and Britthaven filed timely notices of appeal to this Court.³

Analysis

“The fundamental purpose of the certificate of need law is to limit the construction of health care facilities in this state to those that the public needs and that can be operated efficiently and economically for their benefit.” *Hope-A Women’s Cancer Ctr., P.A. v. N.C. Dep’t of Health & Human Servs.*, 203 N.C. App. 276, 281, 691 S.E.2d 421, 424 (2010) (citation and quotation marks omitted), *disc. review denied*, 365 N.C. 87, 706 S.E.2d 254 (2011). Accordingly, health care providers seeking to offer new nursing facility beds must submit an application to the Agency describing the proposed project and receive authorization from it to proceed with the development of such a project. *See* N.C. Gen. Stat. §§ 131E-176(3), 131E-178 (2013).

When deciding whether to issue a CON, a two-step process is generally applied. First, the Agency must determine whether the applications submitted meet the criteria set forth in N.C. Gen. Stat. § 131E-183(a). *Craven Reg’l Med. Auth. v. N.C. Dep’t of Health and Human Servs.*, 176 N.C. App. 46, 57, 625 S.E.2d 837, 844 (2006). Second, “where the Agency finds more than one applicant conforming to the applicable review criteria, it may [then] conduct a comparison of the conforming applications to determine which applicant should be awarded the CON.” *Id.* at 58, 625 S.E.2d at 845.

Following the Agency’s decision to issue a certificate of need to a particular applicant, the remaining applicants that were not selected are entitled to a contested case hearing in the OAH for a review of the Agency’s decision. *See Surgical Care Affiliates, LLC v. N.C. Dep’t of Health & Human Servs.*, ___ N.C. App. ___, ___, 762 S.E.2d 468, 471 (2014) (“After the Agency decides to issue, deny, or withdraw a CON . . . any affected person as defined by section 131E-188(c) shall be entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes.” (citation, quotation marks, and brackets omitted)), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (filed Mar. 5, 2015) (No. 353P14). N.C. Gen. Stat. § 150B-23 requires the party seeking a contested case hearing to file a petition stating facts which tend to establish that

3. Hillcrest did not appeal from the Final Decision and thus is not a party to this appeal. Britthaven and The Heritage do not challenge the ALJ’s conclusion that the Agency properly awarded a CON to BellaRose, and consequently, BellaRose is also not a party to this appeal.

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the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

N.C. Gen. Stat. § 150B-23(a) (2013).

Accordingly, in a contested case hearing, “[t]he administrative law judge must . . . determine whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner’s rights, as well as whether the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule.” *CaroMont Health, Inc. v. N.C. Dep’t of Health & Human Servs.*, ___ N.C. App. ___, ___, 751 S.E.2d 244, 248 (2013) (citation, quotation marks, and emphasis omitted); *see also Surgical Care Affiliates*, ___ N.C. App. at ___, 762 S.E.2d at 471 (explaining that “[t]his Court has interpreted subsection (a) to mean that the ALJ in a contested case hearing must determine whether the petitioner has met its burden in showing that the agency substantially prejudiced the petitioner’s rights. . . . [and] that the agency erred in one of the ways described above” (citation, quotation marks, and brackets omitted)).

In 2011, the General Assembly amended the Administrative Procedure Act (“APA”), conferring upon administrative law judges the authority to render final decisions in challenges to agency actions, a power that had previously been held by the agencies themselves. *See* 2011 N.C. Sess. Laws 1678, 1685-97, ch. 398, §§ 15-55. Prior to the enactment of the 2011 amendments, an ALJ hearing a contested case would issue a recommended decision to the agency, and the agency would then issue a final decision. In its final decision, the agency could adopt the ALJ’s recommended decision *in toto*, reject certain portions of the decision if it specifically set forth its reasons for doing so, or reject the ALJ’s recommended decision in full if it was clearly contrary to the preponderance of the evidence. *See* N.C. Gen. Stat. § 150B-36, *repealed by* 2011 N.C. Sess. Laws 1678, 1687, ch. 398, § 20. As a result of the 2011 amendments, however, the ALJ’s decision is no longer a recommendation to

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the agency but is instead the final decision in the contested case. N.C. Gen. Stat. § 150B-34(a).

Under this new statutory framework, an ALJ must “make a final decision . . . that contains findings of fact and conclusions of law” and “decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.” *Id.*

Our review of an ALJ's final decision is governed by N.C. Gen. Stat. § 150B-51, which provides, in pertinent part, as follows:

(b) The court reviewing a final decision⁴ may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

(c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4)

4. In certificate of need cases, an appeal from a final decision proceeds directly to this Court. *See* N.C. Gen. Stat. § 131E-188(b) (2013) (“Any affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision in the following manner. The appeal shall be to the Court of Appeals as provided in G.S. 7A-29(a).”); N.C. Gen. Stat. § 7A-29(a) (explaining that “appeal as of right lies directly to the Court of Appeals” from final decisions issued under N.C. Gen. Stat. § 131E-188(b)).

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of subsection (b) of this section, the court shall conduct its review of the final decision using the *de novo* standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(b)-(c) (2013).

In the present case, the ALJ determined that the Agency erred by incorrectly applying Criterion 20 and Criterion 13(c) of N.C. Gen. Stat. § 131E-183(a) in its review of the applications for the nursing facility beds at issue. The ALJ concluded that as a result of the Agency's erroneous application of these two criteria, the Agency improperly determined that (1) The Heritage's and Liberty's applications were nonconforming with the review criteria; and (2) Britthaven's application was conforming with the review criteria. The ALJ also found that Liberty had met its burden of showing that it was substantially prejudiced by the Agency's errors.

Consequently, the ALJ reversed the Agency's award of a CON for 120 nursing facility beds to Britthaven and ordered that the CON instead be issued to Liberty. With respect to The Heritage, the ALJ concluded that it had failed to demonstrate that it was substantially prejudiced by the Agency's erroneous disapproval of its application because it was "not one of the three most effective applications in the Review" and, therefore, would not have been approved even if the Agency had found it to be conforming. We address each of these determinations by the ALJ in turn.

I. Criterion 20

[1] Criterion 20 states that "[a]n applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past." N.C. Gen. Stat. § 131E-183(a)(20) (2013). Because the General Assembly has not articulated with specificity how the Agency should determine an applicant's conformity with Criterion 20, the Agency was authorized to establish its own standards in assessing whether an applicant that was already involved in providing health care services had provided quality care in the past. *See* N.C. Gen. Stat. § 131E-177(1) (2013) (explaining that Agency is empowered to "establish standards and criteria or plans required to carry out the provisions and purposes of [the certificate of need statutes]").

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Historically, in determining an applicant's conformity with Criterion 20, the Agency has confined its review to the applicant's facilities within the proposed service area — which, in nursing home reviews, is the county where the proposed facility is to be located. The Agency would then ascertain whether the applicant's facility (or facilities) within that county, if any, had received any citations for substandard quality of care during the 18-month period immediately preceding the Agency's decision. If the applicant did not have any existing facilities within that county, the Agency deemed Criterion 20 “not applicable” to the applicant.

In its petition for a contested case and during the contested case hearing, Liberty contended that the Agency “exceeded its authority and jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, and failed to act as required by law or rule” in determining that its application did not conform to Criterion 20 and that Britthaven's application was, conversely, in conformity with Criterion 20. In making these assertions, Liberty argued that (1) the Agency arbitrarily limited its analysis of whether quality care had been provided in the past solely to the applicants' facilities within Wake County; and (2) Britthaven's application failed to “adequately evidence that quality care had been provided in the past as required by Criterion 20.” Liberty also contended in the contested case hearing that the Agency used an incorrect “look back period” for assessing an applicant's quality of care history.

The ALJ agreed with Liberty's contentions and concluded in his Final Decision that (1) Criterion 20 requires an examination of the quality of care record of the applicant's facilities *statewide*; (2) the relevant time period when assessing an applicant's past quality of care is the 18 months prior to the submission of the applicant's application through the date on which the Agency renders its decision; and (3) Britthaven failed to show conformity with Criterion 20 because the portion of its application addressing quality of care issues at its existing facilities was incomplete and misleading. For these reasons, the ALJ concluded that Britthaven's application was nonconforming with Criterion 20.

In their appeal to this Court, the Agency and Britthaven contend that in making these determinations, the ALJ exceeded his statutory authority and made an error of law by substituting his interpretation of Criterion 20 for the Agency's interpretation. Specifically, they contend that the ALJ failed to give any deference to the Agency's interpretation of this criterion and improperly conducted a *de novo* review in excess of his limited authority pursuant to N.C. Gen. Stat. § 150B-23(a) as interpreted by this Court in *Britthaven, Inc. v. N.C. Dep't of Human Res.*,

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118 N.C. App. 379, 382-83, 455 S.E.2d 455, 459, *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995). Because the Agency and Britthaven assert errors under subsections (2) and (4) of N.C. Gen. Stat. § 150B-51(b), we review the ALJ's determinations regarding the scope of Criterion 20 *de novo*. N.C. Gen. Stat. § 150B-51(c) ("With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the *de novo* standard of review.").

"It is well settled that when a court reviews an agency's interpretation of a statute it administers, the court should defer to the agency's interpretation of the statute . . . as long as the agency's interpretation is reasonable and based on a permissible construction of the statute." *Craven Reg'l*, 176 N.C. App. at 58, 625 S.E.2d at 844; *see also Hospice at Greensboro, Inc. v. N.C. Dep't of Health and Human Servs.*, 185 N.C. App. 1, 13, 647 S.E.2d 651, 659 (explaining that "an agency's interpretation of a statutory term is entitled to deference when the term is ambiguous and the agency's interpretation is based on a permissible construction of the statute" (citation and quotation marks omitted)), *disc. review denied*, 361 N.C. 692, 654 S.E.2d 477 (2007).

Here, the statute at issue — N.C. Gen. Stat. § 131E-183(a)(20) — charges the Agency with determining whether an applicant already involved in the provision of health services has "provide[d] evidence that quality care has been provided in the past" but does not provide guidance for how the Agency is to assess compliance with this criterion. As such, in order to evaluate whether Liberty had met its burden of demonstrating that the Agency's application of Criterion 20 constituted error as defined in N.C. Gen. Stat. § 150B-23(a) that substantially prejudiced Liberty's rights, the ALJ was required to determine whether the process used by the Agency in assessing compliance with Criterion 20 was based on a permissible construction of the statute. *See Cty. of Durham v. N.C. Dep't of Env't & Natural Res.*, 131 N.C. App. 395, 397, 507 S.E.2d 310, 311 (1998) ("If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (citation, quotation marks, and brackets omitted)), *disc. review denied*, 350 N.C. 92, 528 S.E.2d 361 (1999).

In his Final Decision, the ALJ concluded that the geographic scope chosen by the Agency to assess compliance with Criterion 20 was not based upon a permissible interpretation of N.C. Gen. Stat. § 131E-183(a)(20). The ALJ made the following findings of fact on this issue:

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1. The General Assembly has found that to promote the general welfare and health of its citizens, CON applicants for new health services must be evaluated as to the quality of care they will provide. N.C.G.S. § 131E-175(7). Criterion 20 requires that “[a]n applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past.”
2. Criterion 20 serves to benefit future residents of a proposed nursing facility by ensuring that an existing provider cannot be awarded a CON unless it can demonstrate that it is currently providing quality care at its existing facilities. Criterion 20 is especially important in nursing home reviews because the residents of nursing facilities have serious medical issues and are completely dependent on the facility to meet their care needs 24 hours a day.
3. All CON applicants are required to demonstrate how a project will promote quality in the delivery of health care services. Safety and quality are the first basic principle[s] that govern the health care planning process in the State Medical Facilities Plan.
4. Criterion 20 does not specify what geographic area the Agency must consider when evaluating whether an applicant has provided quality care in the past. In other statutory criteria, the legislature has specifically limited the relevant geographic area under consideration to the “service area” at issue. (N.C. Gen. Stat. §§ 131E-183(13)(a), (18a)).
5. It is the Agency’s practice in considering Criterion 20, to limit the geographic scope of its review of substandard quality of care deficiencies to only facilities operated in the service area where the proposed project is to be located. For nursing home reviews, the service area is a single county.
6. In this review, the Agency only considered the applicants’ history of providing quality care in Wake County. The Agency ignored quality of care by an applicant in other counties.
7. The Agency’s interpretation of the geographic scope of the statute has resulted in it determining that Criterion 20

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is not applicable to applicants that operate nursing facilities outside of the county where the proposed project is to be located.

8. The language of Criterion 20 does not expressly limit or even suggest that the geographic scope of the Agency's review should be limited to only those facilities operated in the county where the proposed project is to be located. Instead, Criterion 20 makes clear that all existing providers must demonstrate that they have provided quality care in the past.

9. The Agency provided no reasonable basis for ignoring an applicant's quality track record outside the county in determining conformity with Criterion 20. When asked why the Agency excluded facilities outside the county where the proposed project was to be located, the Assistant Chief of the Agency agreed that it was historical practice and that she did not know why. Mike McKillip, Project Analyst at the Agency's CON Section, testified that he did not know why the Agency has traditionally limited its Criterion 20 analysis to the county at issue in the review.

10. Craig Smith, Chief of the CON Section, testified that it was possible that the Agency would consider quality issues in other counties when determining conformity with Criterion 20, but the Agency would only do so if the Agency determined that the applicant had severe quality issues. However, the evidence shows two examples of nursing home reviews in which the Agency looked outside the county to determine conformity with Criterion 20. In each instance, the applicant had no quality issues that would have resulted in nonconformity with Criterion 20.

....

26. In Section II, Question 6(a) of the nursing home CON application, the Agency asks the applicant to complete a table ("Table 6") and identify whether any of the applicant's existing facilities statewide have experienced any of a set of specified quality-related events. The specified quality-related events include "Substandard Quality of Care as Defined by [the Federal Government]" and "State and Federal Fines."

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. . . .

38. The Agency is obligated to review applications and determine whether they are consistent with the statutory review criteria. N.C. Gen. Stat. § 131E-183(a).

39. In reviewing whether applications submitted in this case conformed to Criterion 20, Mike McKillip, Project Analyst at the Agency's CON Section, sent an e-mail dated December 20, 2011 to Beverly Speroff, Chief of the Agency's Nursing Home Licensure and Certification Section. The e-mail included a list of the applicants' existing facilities in Wake County and asked whether any of those facilities had quality of care problems since August 2010.

40. Ms. Speroff responded to Mr. McKillip's e-mail and stated which of the facilities identified by Mr. McKillip, "had certification deficiencies constituting substandard quality of care during this period." Ms. Speroff's e-mail did not contain any details about the certification deficiencies. Ms. Speroff's e-mail also did not contain any information regarding whether the applicants' remaining facilities in North Carolina had experienced any quality of care issues.

41. Mr. McKillip and Martha Frisone, Assistant Chief of the Agency's CON Section, both testified that the Agency's determination of whether the applications in this review conformed to Criterion 20 was based entirely on Ms. Speroff's e-mail.

(Certain citations omitted.)

Based on these findings, the ALJ made the following pertinent conclusions of law:

24. The Agency erred and acted in contradiction of law by limiting the geographic scope of Criterion 20 to facilities located in the county where the proposed project was to be located in determining conformity with Criterion 20.

25. In considering the geographic scope of Criterion 20, the first step is to review the plain language of the statute to determine if it explicitly supports the Agency's interpretation. *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574-75, 573 S.E.2d 118, 121 (2002).

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26. Nothing in the plain language of Criterion 20 suggests that the General Assembly intended the Agency to limit its review of past quality of care provided by existing providers to facilities located in the county where the proposed facility would be located. Moreover, the language of Criterion 20 does not support a reading of the statute that allows the Agency to ignore existing health service providers on the basis that the services are provided outside the county where the proposed project is to be located. Instead, the plain language of Criterion 20 very explicitly states, without qualification, that if the applicant is an existing provider of health service[s], that provider must demonstrate that it has provided quality of care in the past. N.C.G.S. § 131E-183(a)(20).

27. The Agency and Britthaven contend that since the service area for the need allocation is Wake County, Criterion 20 should be interpreted to limit quality of care review to Wake County. However, a bedrock principle of statutory construction is that the court must consider a statute as a whole and presume that the legislature understood its choice of words when drafting the statute. *Housing Auth. of Greensboro v. Farabee*, 284 N.C. 242, 245, 200 S.E.2d 12, 15 (1973); *see also N.C. Dept. of Revenue v. Hudson*, 196 N.C. App. 763, 768, 675 S.E.2d 709, 711 (2009) (if legislation includes particular language in one section but omits it in another, it is presumed the legislature acted intentionally).

28. Unlike Criterion 20, in enacting Criterion 13(a), the General Assembly limited the use of the comparison to be made by the Agency to the “applicant’s service area.” N.C.G.S. § 131E-183(a)(13)(a). Similarly in Criterion 18, the applicant must only demonstrate the effects on competition in the proposed “service area.” N.C.G.S. § 131E-183(a)(18). If the General Assembly had intended to limit the Agency’s consideration of quality to only the proposed “service area,” which in this case is Wake County, it would have included such language in Criterion 20 as it did in Criteria 13(a) and 18. *Farabee*, 284 N.C. at 245, 200 S.E.2d at 15; *N.C. Dept. of Revenue v. Hudson*, 196 N.C. App. at 768, 675 S.E.2d at 711.

29. In interpreting a statute, a court should also consider the policy objectives prompting passage of the statute and

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should avoid a construction which defeats or impairs the purpose of the statute. *O & M Industries v. Smith Engineering Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 349 (2006).

30. The General Assembly has unambiguously determined that the general welfare and protection of lives and health of the citizens of North Carolina require that proposed health services be reviewed and evaluated as to quality of care. N.C.G.S. § 131E-183(a)(20). The CON Section's interpretation of Criterion 20 impairs the purpose of the statute by restricting the Agency's quality review to such a limited and arbitrary geographic area.

31. While traditionally the interpretation of a statute by an agency created to administer the statute is accorded some deference, "those interpretations are not binding, and the weight of such an interpretation in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade. *Total Renal Care of North Carolina, LLC v. North Carolina Dept. of Health and Human Services, Div. of Facility Services, Certificate of Need Section*, 171 N.C. App. 734, 615 S.E.2d 81 (2005). The Agency's interpretation of the geographic scope of Criterion 20 is not based on thorough consideration or valid reasoning.

32. The nursing facility application form requires applicants to provide state-wide quality of care information. N.C.G.S. § 131E-182(b) requires that applicants "be required to furnish only that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria implemented under G.S. § 131E-183 and with duly adopted standards, plans and criteria." By creating a policy that ignores and treats as irrelevant the state-wide quality of care information that has been requested in the application form, the Agency has erred and acted contrary to N.C.G.S. § 131E-182(b).

33. A state-wide review of all of the nursing facilities operated by an applicant is consistent with the importance that the General Assembly placed on awarding CONs to quality

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providers when it created the CON statute. (*See* N.C.G.S. § 131E-175(7); *see also* Agency Ex. 818, p. 2, CON Basic Principle No. 1).

34. The Agency's policy of ignoring quality issues that exist outside the county under review is inconsistent with the importance that the General Assembly has placed on quality in the CON statute and is not in the best interest of future nursing home patients.

35. N.C.G.S. § 131E-182(b) and the CON Section's Nursing Facility Application provides an additional justification for finding that the Agency was required to conduct a state-wide review of quality in this case.

36. N.C.G.S. § 131E-182(b) requires that the Agency only request information in its application form that is necessary to determine whether the proposed project is consistent with the review criteria.

37. The nursing facility application created by the CON Section specifically requires applicants to provide quality information for all facilities the applicant owns or operates in North Carolina and does not limit its request only to the county where the proposed project will be located. (Joint Ex. 6).

38. Based on the language of N.C.G.S. § 131E-182(b), by requesting survey history for all facilities in the state, the Agency has determined that state-wide information is necessary to determine conformity with Criterion 20. It is unreasonable and contrary to N.C.G.S. § 131E-182(b) for the Agency to request information from applicants and ignore that information.

39. Based on the above, the Agency was required to consider quality information on a statewide basis. The Agency failed to meet this requirement by only considering quality information relating to Wake County facilities.

....

47. In order to fulfill its obligation of determining whether applications are consistent with statutory review criteria, the Agency must perform a meaningful analysis.

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48. To perform a meaningful analysis of whether an applicant conforms to Criterion 20, the Agency must analyze and give due regard to the information available to it that is reasonably related to an applicant's history of providing quality care.

49. In this case, the Agency did not analyze or give due regard to the information available to it that is reasonably related to the applicants' history of providing quality care. Specifically, the Agency did not analyze or give due regard to the public comments regarding the quality issues at Britthaven facilities or any of the other Applicants across the State. Likewise the Agency did not analyze information available to it related to any of the Petitioners' histories of providing quality of care throughout the State.

50. By failing to analyze or give due regard to the substantial information available to the Agency that was reasonably related to the applicants' history of providing quality care, the Agency failed to perform a meaningful analysis of whether the applications conformed to Criterion 20.

51. By failing to perform a meaningful analysis of whether the applications conformed to Criterion 20, the Agency failed to fulfill its obligation of determining whether the applications were consistent with Criterion 20.

The ALJ also concluded that the Agency had utilized the incorrect time frame in its assessment of the applicants' conformity with Criterion 20. Specifically, the ALJ found that while the application form developed by the Agency required applicants to provide quality of care information for the 18 months *immediately preceding the submittal of the application*, it was the Agency's practice "to only consider substandard quality of care occurring eighteen (18) months *prior to the issuance of the CON Section's decision.*" (Emphasis added.)

The ALJ determined that the Agency's policy of ignoring approximately four months of quality of care data contained in the applications was contrary to N.C. Gen. Stat. § 131E-182(b), which provides that an application form shall require such information as the Agency "deems necessary to conduct the review" and that "[a]n applicant shall be required to furnish only that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria implemented under G.S. 131E-183 and with duly

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adopted standards, plans and criteria.” N.C. Gen. Stat. § 131E-182(b) (2013). As such, the ALJ concluded that the appropriate look back period for assessing an applicant’s compliance with Criterion 20 extended from 18 months prior to the submission of the application up to the date that the Agency issued its decision.

As discussed above and as the ALJ noted in his Final Decision, an agency’s interpretation of a statute that it is tasked with administering should be accorded some deference by the reviewing tribunal. *Good Hope Health Sys., LLC v. N.C. Dep’t of Health & Human Servs.*, 189 N.C. App. 534, 544, 659 S.E.2d 456, 463, *aff’d per curiam*, 362 N.C. 504, 666 S.E.2d 749 (2008). The agency’s interpretation is only entitled to such deference, however, if it is both reasonable and based on a permissible construction of the statute. *Craven Reg’l*, 176 N.C. App. at 58, 625 S.E.2d at 844. The weight given to the agency’s interpretation by a reviewing court depends upon “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade” *Good Hope*, 189 N.C. App. at 544, 659 S.E.2d at 463 (citation and quotation marks omitted). Therefore, we must consider whether deference should be accorded to the Agency’s interpretation of (1) the appropriate geographic scope of the quality of care assessment required under Criterion 20; and (2) the length of the look back period under Criterion 20. We address each in turn.

A. Geographic Scope

[2] With regard to the geographic scope of the quality of care evaluation, we agree with the ALJ’s conclusion that the Agency’s interpretation of Criterion 20 was not based on a permissible construction of N.C. Gen. Stat. § 131E-183(a). “The cardinal principle of statutory construction is that the intent of the legislature is controlling. In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish.” *State ex rel. Utils. Comm’n v. Pub. Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 443-44 (1983) (internal citations omitted); *see also Martin v. N.C. Dep’t of Health & Human Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (“The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent.” (citation and quotation marks omitted)), *disc. review denied*, 363 N.C. 374, 678 S.E.2d 665 (2009).

It is clear from the testimony offered at the contested case hearing that the Agency’s practice of only examining an applicant’s quality of

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care record within the service area of the proposed project is longstanding. Assistant Chief of the CON Section Martha Frisone ("Frisone") testified that evaluating the applicant's quality of care "track record" for only those facilities within the proposed service area had been the practice of the Agency for at least the 18 years she had been employed by the Agency and that she was trained to follow this practice upon her hiring. She explained that when the Agency is "doing a review and we're looking at Criterion 20, the first question we ask is does this project involve an existing facility. And if so, we will inquire about the quality of care track record at that facility, and then we will look at affiliated facilities in the same county." Frisone further testified that under this method of assessing conformity with Criterion 20, if an applicant does not have any existing facilities within the proposed service area, the Agency will find that Criterion 20 is "not applicable" to that applicant.

A longstanding and consistent interpretation of a statute by an administrative agency warrants greater deference than an inconsistent or novel interpretation. *See Martin*, 194 N.C. App. at 724, 670 S.E.2d at 635 (explaining that "consistently held agency view" was entitled to significantly more deference than an interpretation that conflicts with an earlier agency interpretation). However, courts will not defer to an agency's interpretation of a statute that is an impermissible construction of the statute. *Craven Reg'l*, 176 N.C. App. at 58, 625 S.E.2d at 844.

As the ALJ noted, certain review criteria in N.C. Gen. Stat. § 131E-183(a) are specifically limited to the service area of the proposed project. Criterion 18a, for example, requires the applicant to "demonstrate the expected effects of the proposed services on competition *in the proposed service area . . .*" N.C. Gen. Stat. § 131E-183(a)(18a) (emphasis added). Criterion 20, on the other hand, contains no such geographic limitation.

It is well established that in order to determine the legislature's intent, statutory provisions concerning the same subject matter must be construed together and harmonized to give effect to each. *Cape Hatteras Elec. Membership Corp. v. Lay*, 210 N.C. App. 92, 101, 708 S.E.2d 399, 404 (2011). Furthermore, as this Court has previously explained, "[w]hen a legislative body includes particular language in one section of a statute but omits it in another section of the same [statute], it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion." *N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) (citation, quotation marks, and brackets omitted).

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Consequently, it is legally significant that the General Assembly made no mention of the service area of the proposed project in Criterion 20. As such, basic principles of statutory construction support the ALJ's conclusion that the General Assembly did not intend for the Agency's evaluation of an applicant's past quality of care to be limited to the service area of the proposed project.

In addition, "under no circumstances will the courts follow an administrative interpretation in direct conflict with the clear intent and purpose of the act under consideration." *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012) (citation, quotation marks, and alteration omitted). In addition to controlling health care costs and avoiding the costly and unnecessary duplication of health service facilities, a primary reason for the existence of the CON laws is to protect the health and well-being of the citizens of North Carolina. N.C. Gen. Stat. § 131E-175(7). Indeed, the General Assembly made specific findings explaining the underlying purpose of requiring health care entities to obtain CONs and how the CON laws promote the general welfare of the public. In particular, the General Assembly stated

[t]hat the general welfare and protection of lives, health, and property of the people of this State require that new institutional health services to be offered within this State be subject to review and evaluation as to need, cost of service, accessibility to services, quality of care, feasibility, and other criteria as determined by provisions of this Article . . . prior to such services being offered or developed in order that only appropriate and needed institutional health services are made available in the area to be served.

Id. Thus, the clear intent of the General Assembly was to ensure that the quality of care history of an existing health care provider be subject to meaningful evaluation before that provider is allowed to offer additional services within North Carolina that are subject to the CON laws.

Here, the Agency's interpretation of Criterion 20 resulted in its determination that Criterion 20 was "not applicable" to several of the applicants simply because they did not have existing facilities in Wake County. Thus, the quality of care history of applicants such as The Heritage, which were already providing nursing care services within North Carolina but did not have any facilities in Wake County, was not assessed despite Criterion 20's mandate for the Agency to determine

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whether an applicant already involved in the provision of health services has shown that quality care has been provided in the past. N.C. Gen. Stat. § 131E-183(a)(20).

We see no logical basis for disregarding such information evidencing quality of care on a statewide level. Indeed, we believe that such a policy actually contravenes one of the primary purposes of the CON laws. *See O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) (stating that construction of statute which impairs or defeats purpose of statute should be avoided).

Significantly, the testimony from the contested case hearing demonstrates that Agency employees were unable to identify a plausible justification for its past interpretation of the geographic scope element of Criterion 20. Michael McKillip ("McKillip"), a project analyst for the Agency, admitted that he did not know why the Agency limited its analysis to the service area at issue, simply stating that it was just "how we review applications under Criterion 20." Likewise, Frisone testified that she did not know how the Agency initially formulated this interpretation of Criterion 20 but that it had been used for at least the past 18 years and "in that period of time, it has never been questioned that we should look statewide, nationwide, [or] worldwide when we're evaluating Criterion 20."

The inability of the Agency's own employees to provide a coherent rationale for its interpretation of the geographic scope of Criterion 20 provides additional support for our conclusion that no deference is owed to the Agency on this issue. *See Cashwell v. Dep't of State Treasurer*, 196 N.C. App. 81, 89, 675 S.E.2d 73, 78 (2009) (explaining that deference should only be accorded to agency interpretation "if the agency's interpretation of the law is not simply a 'because I said so' response" (citation, quotation marks, and alteration omitted)).

B. Look Back Period

[3] With regard to the look back period applicable to Criterion 20, we likewise conclude that the ALJ correctly determined that the Agency's interpretation was not entitled to deference. On this issue (unlike the issue of the appropriate geographic scope of Criterion 20), application of principles of statutory construction to N.C. Gen. Stat. § 131E-183(a) do not provide an answer. However, it is clear that the look back period the Agency utilizes in assessing an applicant's conformity with Criterion 20 differs from the temporal scope of the quality of care information it requires an applicant to provide in its application. By looking solely at the 18 month-period prior to its decision rather than to the 18 months

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preceding the submission of the application, the Agency disregarded several months of quality of care data — information that it specifically required the applicants to report.

The ALJ found that the Agency’s practice of ignoring this information was improper because N.C. Gen. Stat. § 131E-182(b) “prohibits the Agency from creating an application form that requires the applicant to furnish anything more than that which is necessary to a determination of whether the application is consistent with the applicable standards, plans and criteria.” N.C. Gen. Stat. § 131E-182(b) states as follows:

An application for a certificate of need shall be made on forms provided by the Department. The application forms, which may vary according to the type of proposal, shall require such information as the Department, by its rules deems necessary to conduct the review. An applicant shall be required to furnish only that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria implemented under G.S. 131E-183 and with duly adopted standards, plans and criteria.

The Agency’s response to this finding is that N.C. Gen. Stat. § 131E-182(b) merely requires it to limit the information sought from applicants to that which “might be useful” in a review so as to prevent the Agency from engaging in a “fishing expedition.” We agree with the ALJ’s determination on this issue. Although the statute affords the Agency a measure of discretion in formulating the appropriate look back period, the Agency used that discretion by creating an application that requests information for the 18-month period preceding the submission of the application. The record is devoid of any explanation from the Agency of the basis for its practice of deviating from the time period referenced in its own application when applying Criterion 20. As such, we cannot say that the ALJ erred in his determination that the Agency is bound to utilize a look back period of 18 months preceding the date of the application’s submission through the date of the Agency’s decision.⁵

Having determined that the ALJ’s conclusions as to the proper geographic and temporal parameters of Criterion 20 were not erroneous,

5. We also agree with the ALJ’s conclusion that this longer look back period is “reasonable and consistent with” the legislative purpose underlying Criterion 20 by offering a more comprehensive evaluation of a health care provider’s past history of quality care in its provision of health services.

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we must now examine the ALJ's specific application of Criterion 20 to Britthaven and Liberty.

C. Application of Criterion 20 to Britthaven

[4] In his Final Decision, the ALJ reversed the Agency's determination that Britthaven had demonstrated a history of quality care in conformity with Criterion 20, making the following findings of fact:

23. Criterion 20 puts the burden on the applicant to prove that it has provided quality care in the past: "An applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past."

....

26. In Section II, Question 6(a) of the nursing home CON application, the Agency asks the applicant to complete a table ("Table 6") and identify whether any of the applicant's existing facilities statewide have experienced any of a set of specified quality-related events. The specified quality-related events include "Substandard Quality of Care as Defined by [the Federal Government]" and "State and Federal Fines."

....

28. Although Britthaven identified 46 facilities in Table 6 of the Britthaven Application, it did not disclose that any of those facilities had experienced incidents of substandard quality of care. The evidence at the hearing revealed that, in fact, seven (7) Britthaven facilities had experienced eleven (11) events constituting substandard quality of care during the eighteen (18) months prior to the application date.

29. Max Mason, who prepared the Britthaven Application, testified at the hearing that Britthaven's events of substandard quality of care were purposefully not identified in the Britthaven Application because he knew that the Agency would only evaluate whether Britthaven's Wake County facility had provided quality care in the past, and none of Britthaven's eleven (11) events of substandard quality of care occurred at Britthaven's Wake County facility.

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30. The Britthaven Application did identify several “State and Federal Fines.” However, in response to Question 6(b), which asked for the circumstances surrounding all disclosed quality events, the Britthaven Application stated: “The penalties against the various facilities were assessed for alleged deficiencies. Except where otherwise noted, all matters are under appeal with CMS.” The evidence at the hearing revealed that at least some of the disclosed fines were in fact not under appeal with CMS when Britthaven filed its application. At the hearing, Mr. Mason testified that the statement in the Britthaven Application indicating that all fines were under appeal was not true and was simply boilerplate language that Britthaven used in multiple CON applications.

31. Mr. Mason testified that although he is ultimately in charge of completing CON applications on behalf of Britthaven, he relies on a paralegal, Martha McMillan, to fill out Table 6 of the application. He does not independently verify her work, nor does he know the procedure she follows in filling out Table 6. He further testified that he was not familiar with her qualifications. To his knowledge, Ms. McMillan has no clinical training or experience with CMS surveys. Britthaven did not call Ms. McMillan as a witness at the hearing. Mr. Mason also testified that based on the Agency’s longstanding practice of basing conformity determinations on the survey history of facilities within the same county as the proposed facility, he generally verifies the information provided by Ms. McMillan for any facilities in the same county where the proposed facility is to be located.

32. Mike McKillip, the analyst who performed the review in this case, testified that his interpretation of Table 6 of the Britthaven Application was that no Britthaven facility in North Carolina had an episode of Substandard Quality of Care.

33. Mr. McKillip testified that Britthaven should have identified which of its facilities had experienced events constituting substandard quality of care. He further testified that had Britthaven fully identified its events of substandard quality of care, he would likely have followed up on the

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disclosed issues. Craig Smith, Chief of the Agency's CON Section, testified that he expects the entire CON application to be completed in a complete and accurate manner.

34. Doug Suddreth, who was admitted as an expert in the development and operation of nursing homes, the preparation, review and analysis of CONs, health planning, facility management and design and how care practices and work care practices flow from such design, and who testified on behalf of Britthaven and BellaRose, opined that it was a mistake for Britthaven not to fully complete Table 6.

(Internal citations omitted.)

Based on these findings of fact, the ALJ made the following conclusions of law concerning the issue of whether Britthaven had complied with Criterion 20:

62. Britthaven had an obligation under the CON law and Agency regulations, as well as a responsibility to the citizens of this State, to fully, completely and truthfully fill out Table 6 of the CON application form. Britthaven's intentional failure to fully, completely and truthfully fill out Table 6 of the CON application form was misleading and contrary to its legal requirements.

63. Even if the Agency's traditional Criterion 20 analysis was limited to the county at issue in the review, Britthaven was not excused from its obligation to fully, completely and truthfully fill out Table 6 of the CON application form.

64. By failing to fully, completely and truthfully fill out Table 6 of the CON application form, Britthaven failed to meet its burden of proving that it provided quality care in the past under Criterion 20.

65. The Agency must conduct an assessment of all relevant information in support of and indeed in opposition to an application. To do so the Agency must be able to rely on all information requested within the application. Britthaven's intentional omissions regarding quality of care prevents the Agency from conducting that independent evaluation that it must to assure itself and indeed the public of a fair and honest judgment on the issue. The failure to provide that information necessarily prevents the required evaluation and necessarily makes the Agency's

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decision regarding Britthaven's past quality of care arbitrary and capricious.

66. Britthaven's failure to meet its requirement of proving that it provided quality care in the past under Criterion 20 renders the Britthaven Application nonconforming and therefore unapprovable.

On appeal, Britthaven argues that (1) the ALJ's characterization of the omissions from its application as intentional is not supported by the evidence; and (2) the ALJ erred as a matter of law in concluding that the omissions from its application necessarily rendered Britthaven nonconforming with Criterion 20. We agree.

At the contested case hearing, Maxwell Mason ("Mason") — who was responsible for overseeing CON-related matters for Britthaven, including the preparation of Britthaven's CON applications — testified that an employee, Martha McMillan ("McMillan"), prepared Table 6 in Britthaven's application. Mason stated that the table completed by McMillan appeared correct when he reviewed it but that he did not "go figure out where all the survey findings are and letters from Licensure and Certification and try to recreate the table" because McMillan was more familiar than he was with that data.

Mason further testified that he attempts to verify the accuracy of information provided to him in connection with CON applications "to the extent feasible." He further stated, however, that in light of the Agency's historical practice of examining only the facilities located in the service area of the proposed new project in its Criterion 20 review, he would personally conduct an inquiry into the quality of care history solely as to any facilities located within the particular service area at issue.

When specifically asked about whether Britthaven's omission of the "Xs" that should have been included in Table 6 to denote that a facility had been cited for substandard quality of care was deliberate, Mason responded that it was Britthaven's intention for its application to be both complete and accurate and that the omissions were inadvertent.

There was no intent for there not to be Xs. As best I can understand it, there was some misunderstanding on the part of Ms. McMillan about how this table should be completed. But as I said, she's done it for a while and it never came to our attention that there was a problem. So that's all I can say about it. But I mean I certainly didn't tell anyone or consciously say let's remove Xs.

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Liberty asserts that the ALJ's determination that Britthaven intentionally omitted this information is supported by substantial evidence because Mason also testified that Britthaven chose to provide responses with "less detail" to inquiries into the circumstances of fines that had been imposed on various Britthaven facilities. Mason's testimony on this issue was that the section of the application requesting the applicant to describe the circumstances of each fine imposed "doesn't prescribe specific expectations for the content" and that Britthaven provided "a general response" in that section "based on our experience of how the Agency reviews this information."

In our view, this testimony falls short of supporting a conclusion that Britthaven *intentionally* omitted key information from its application. Rather, it merely shows that Britthaven's answers in that section were not comprehensive explanations but rather general responses based on its assessment of "the extent of the response that's required."

We have carefully reviewed the record and have failed to identify evidence that would warrant a finding that Britthaven "purposefully" excluded information concerning the quality of care record of its facilities outside of Wake County.⁶ Indeed, we note that toward the conclusion of the hearing, the ALJ appears to have expressed agreement with Britthaven's contention that there had not been any evidence presented of intentional omissions by any applicant. During the cross-examination of Frisone, the following interchange took place:

[Counsel for The Heritage]: Would you consider it would be an issue if an applicant intentionally omits information?

A. Well I—

[Counsel for Britthaven]: (interposing) I just want to object, Your Honor. At this point I don't think there's been any evidence that anybody intentionally omitted anything.

The Court: *And I agree with that*, but I think her question is fair. I'm not relating it to this specific — it's generally if it is found to be. Do you understand, Ms. Frisone? I'm not

6. It is worthy of mention that the ALJ separately determined that Liberty's application also contained various errors, which included the omission of three Liberty facilities from Table 6 of its application and an erroneous statement that it was awaiting the resolution of an "appeal from the findings of the survey at Liberty's Rowan County facility" when, in fact, the appeal had already been denied. The ALJ characterized these errors as "inadvertent" without articulating any basis for this characterization.

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taking it to mean this application itself at this point, but her question is in general.

(Emphasis added.)

[5] We next turn to the ALJ's ultimate conclusion that Britthaven's application was nonconforming with Criterion 20. As evidenced by the conclusions of law quoted above, the ALJ's determination that Britthaven failed to conform to Criterion 20 was based solely on Britthaven's incomplete responses in Table 6 of its application. On appeal, Britthaven and the Agency argue that the ALJ's failure to make findings and conclusions concerning Britthaven's actual record of providing care based on the information available to the Agency and the evidence offered at the contested case hearing was an error of law, rendering his conclusion of nonconformity arbitrary and capricious. Once again, we agree.

While the ALJ noted in his Final Decision that Britthaven had received 23 substandard quality of care citations from 12 surveys that were conducted at Britthaven's facilities during the relevant time period, the ALJ did not make any findings discussing the significance of these citations nor did he expressly base his finding of nonconformity on their existence or on any other aspect of Britthaven's actual survey history. Instead, the ALJ concluded that Britthaven's inaccuracies in its completion of Table 6 "necessarily prevent[ed]" the Agency from conducting its evaluation of past quality of care, and as a result, Britthaven could not meet its burden of demonstrating pursuant to Criterion 20 that it had provided quality care in the past.

We believe this conclusion is contradicted both by the testimony of Agency officials and by the ALJ's own determinations that (1) the Agency had "substantial information" before it concerning Britthaven's statewide quality of care record; and (2) the Agency is empowered to — and should — look beyond the application itself to determine an applicant's conformity with the review criteria.

At the hearing, Frisone explained that the Agency could find an application nonconforming based on an applicant's omissions or misrepresentations in the application *if* the information at issue could not be found elsewhere in the submitted materials or was not publicly available. She testified that the Agency is not confined to the information contained in an application and instead may use whatever evidence is available to it in assessing an applicant's conformity with the review criteria. She further testified that in this particular case "the omission is in section II(6)(a), and that is an area where we are going to corroborate or document that quality of care track record for those facilities that we're

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going to look at by contacting the Licensure and Certification Section for publicly available information.” She stated that, for this reason, Britthaven’s failure to fully complete Table 6 would not have prevented the Agency from assessing its conformity with Criterion 20 and should not be grounds for finding the Britthaven application nonconforming with Criterion 20.

Similarly, Craig Smith (“Smith”), Chief of the CON Section, testified that the Agency will examine the information provided by an applicant as well as any additional information it obtains from other sources to determine the applicant’s conformity with the review criteria. He also stated that he could not envision the Agency “being so draconian that we would disqualify somebody for omitting a response” when the Agency was nevertheless able to assess the applicant’s conformity through other sources.

Moreover, in spite of his conclusion that Britthaven’s omissions had prevented the Agency from meaningfully reviewing its quality of care record statewide, the ALJ specifically noted that other applicants had made the Agency aware of a number of the substandard quality of care citations at Britthaven facilities during the Agency’s initial review of the applications. The ALJ also found that the Agency should have analyzed such information in performing its review of Criterion 20. This Court has previously recognized that the Agency may take into account information beyond that contained within the application itself in making its decision. *See In re Wake Kidney Clinic, P.A.*, 85 N.C. App. 639, 643-44, 355 S.E.2d 788, 790-91 (explaining that Agency can consider information not contained in CON application but otherwise made available to it in making determination of conformity with review criteria), *disc. review denied*, 320 N.C. 793, 361 S.E.2d 89 (1987).

Notably, Frisone testified that the reason she did not look into these citations was because they did not occur in Wake County and the information the Agency had received during the public comment period did not “lead me to believe that we should vary from our practice of looking only at the facilities in Wake County.” Thus, while the evidence supports a finding that the Agency *did not* examine Britthaven’s record of quality of care outside of Wake County, it does not support the ALJ’s conclusion that the Agency *could not* examine Britthaven’s history of quality of care because of the omitted information on its application. To the contrary, the Agency’s failure to conduct such an examination resulted from the Agency’s own practice of confining its review of Criterion 20 to the service area of the proposed project.

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Our conclusion that the ALJ erred in determining that Britthaven must be found nonconforming because its omissions prevented a meaningful analysis of Criterion 20 is not a departure from the well-established principle that “[t]he burden rests with the applicant to demonstrate that the CON review criteria are met.” *Good Hope*, 189 N.C. App. at 549, 659 S.E.2d at 466. Rather, our holding is simply that the record does not support the ALJ’s findings that (1) Britthaven intentionally submitted an application with misrepresentations and omissions; or (2) these misrepresentations and omissions precluded the Agency from conducting a meaningful review of Britthaven’s application to assess conformity with Criterion 20.

For these reasons, we hold that the ALJ erred in summarily concluding that Britthaven was nonconforming without actually examining the quality of care provided by it in the past. As such, a remand is necessary so that the ALJ may make a substantive determination of whether Britthaven was in conformity with Criterion 20 based on its actual quality of care record.⁷ See N.C. Gen. Stat. § 150B-51(b) (“The court reviewing a final decision may . . . remand the case for further proceedings.”).

D. Application of Criterion 20 to Liberty

[6] The ALJ next concluded that the Agency erred — and, in so doing, substantially prejudiced Liberty’s rights — by finding that Liberty’s application was nonconforming with Criterion 20. The Agency had determined that Liberty was nonconforming and therefore unapprovable because its Wake County facility, Capital Nursing and Rehabilitation Center, “had certification deficiencies constituting substandard quality of care, including immediate jeopardy to resident health or safety.” For this reason, pursuant to the Agency’s historical practice of assessing conformity, it concluded that Liberty was nonconforming with Criterion 20.

In his findings, the ALJ noted that Liberty operated 17 facilities in North Carolina and had received 8 citations statewide for substandard quality of care from 4 surveys conducted during the pertinent look back period. Without addressing the particular circumstances surrounding Liberty’s substandard quality of care citations or explaining his reasoning, the ALJ summarily concluded as a matter of law that “Liberty met

7. We wish to emphasize that nothing herein should be construed as suggesting that this Court condones the submission of applications containing misrepresentations or omissions. We express no opinion as to the types of circumstances that would have to exist in order for an applicant’s misrepresentations or omissions to justify a finding of nonconformity on that ground.

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its burden at the hearing of establishing that it had provided quality care in the past in its existing North Carolina facilities.” Britthaven, The Heritage, and the Agency argue that this conclusion was erroneous and unsupported by adequate findings of fact.

As discussed above, the ALJ’s Final Decision rejected the Agency’s historical approach to assessing conformity with Criterion 20, concluding that the Agency’s restriction of its analysis to facilities within the county of the proposed project and utilization of a look back period consisting of only the 18 months immediately preceding the Agency’s decision were incorrect. While we agree with the ALJ’s analysis of the proper geographic and temporal scope of Criterion 20 in the abstract, the Final Decision is unclear as to how the ALJ actually applied these principles to Liberty and the particular information he relied upon in determining that Liberty’s application was consistent with Criterion 20. Indeed, the only discernible support the Final Decision attempted to offer for its determination that Liberty met its burden of demonstrating conformity with Criterion 20 was the bare conclusion that

Liberty identified and addressed the issues of substandard quality of care at its facilities and took steps to prevent similar problems in the future. The events constituting substandard quality of care at Liberty facilities were isolated and unrelated.

Fundamental to this Court’s ability to review a final decision and analyze whether “the findings, inferences, conclusions, or decisions” of the ALJ are affected by errors of law or are arbitrary, capricious, or an abuse of discretion is the existence of adequate findings of fact. N.C. Gen. Stat. § 150B-51; *see generally, Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (explaining that lower tribunal must provide appellate court with “sufficient information in its order to reveal . . . the application of [its] review” (citation and quotation marks omitted)).

Here, we are presently unable to determine whether the ALJ erred in concluding that Liberty’s application was in conformity with Criterion 20 because the Final Decision provides no substantive explanation of how it reached this conclusion. The ALJ made multiple findings suggesting that the Agency should expand the data sources it considers in assessing an applicant’s quality of care track record, noting that the Agency “failed to consider any matters of positive quality of care.” The ALJ also noted the Nursing Home Compare data, the CMS Quality Score, and other evidence presented by the parties comparing the

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number of substandard quality of care citations an applicant has received to the total number of patient days of care provided by the applicant. However, the ALJ made no mention of whether such information factored into his assessment of Liberty's quality of care record and offered no explanation as to the actual basis for his conclusion.

Throughout the hearing, the parties raised various possible methods of assessing an applicant's conformity with Criterion 20. The Heritage advocated for a "zero tolerance" policy, whereby an applicant would be found nonconforming if it had received even one single substandard quality of care citation at any of its facilities within North Carolina during the relevant look back period.⁸ The ALJ expressly rejected this interpretation of Criterion 20, stating that "[t]he plain language of Criterion 20 does not require any such zero-tolerance standard, and nothing in the text or legislative findings of the CON Act, or any other statute suggests that the General Assembly intended for the Agency's inquiry under Criterion 20 to function in such a manner." The ALJ also relied on Frisone's testimony at the hearing that a statewide zero tolerance policy would not be feasible because it would substantially reduce the pool of approvable applicants, concluding that a statewide zero tolerance policy was "unreasonable, inequitable, inconsistent with Agency practice, and would not effectively achieve the purposes of the CON Act."

Thus, while the ALJ clearly rejected a zero tolerance policy for assessing compliance with Criterion 20, he also specifically "decline[d] to offer specific methods for the Agency" to utilize in determining conformity with Criterion 20, stating that "find[ing] another way or ways of evaluating Criterion 20. . . is not the role of the Office of Administrative Hearings . . . or the purpose[] of a contested case hearing." The problem with the ALJ's reasoning is that the Final Decision simultaneously (1) stated the ALJ's belief that it was up to the Agency to formulate a standard for assessing compliance with Criterion 20; yet (2) nevertheless proceeded to conclude that Liberty had somehow met this unarticulated standard. In reaching these logically inconsistent conclusions, we believe the ALJ erred. It cannot be determined whether either Liberty or Britthaven conformed with Criterion 20 without a prior understanding of the appropriate standard for assessing such conformity.

8. Such a policy would have incorporated the Agency's existing approach — whereby applicants were deemed nonconforming if they had a single substandard quality of care citation in the county of the proposed project during the applicable look back period — and expanded its reach so that all facilities statewide would be considered.

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The ALJ's Final Decision implicitly recognized that the Agency — as the entity possessing institutional expertise as to CON-related issues and tasked by the General Assembly with administering the CON statutes — is ultimately responsible for developing an appropriate standard for assessing conformity with Criterion 20 (albeit one that is consistent with the CON Laws). *See* N.C. Gen. Stat. § 131E-177(1) (giving Agency authority to “establish standards and criteria or plans . . . and to adopt rules pursuant to Chapter 150B of the General Statutes, to carry out the purposes and provisions of [the CON statutes]”).

However, as a result of the General Assembly's 2011 statutory amendments to the APA, the ALJ — rather than the Agency — is entrusted with the duty of making a final decision in any CON matter that becomes the subject of a contested case, and the APA does not provide ALJs with the authority to remand an action back to the Agency for further proceedings. N.C. Gen. Stat. § 150B-34. Accordingly, in cases where, as here, an ALJ has determined that the Agency erred, it is his responsibility to explain why the Agency's decision was erroneous and why the Final Decision he renders is a correct application of the law to the facts of the case. *See id.* (“In each contested case the administrative law judge shall make a final decision or order that contains findings of fact and conclusions of law.”).

Therefore, the ALJ, on remand, must make findings of fact and conclusions of law to support his ultimate determination as to whether Liberty and Britthaven adequately demonstrated that they conformed to Criterion 20 by providing quality care in the past.⁹

II. Criterion 13(c)

[7] The last issue presented on appeal concerns the ALJ's finding that (1) The Heritage's application was conforming to Criterion 13(c) but that (2) the denial of a CON to The Heritage did not constitute error because its application was comparatively less effective than the applications of BellaRose, Liberty, and Britthaven (such that The Heritage would not ultimately have been selected even if the Agency had found The Heritage to be conforming with Criterion 13(c)).

The ALJ's determination that The Heritage's application was comparatively less effective than the applications of Liberty and Britthaven

9. In performing this task, he is, of course, free to seek input from the Agency, as well as from the other parties, before rendering a new final decision.

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is unchallenged by the parties. However, because we are vacating the ALJ's determination regarding the conformity of Liberty's and Britthaven's applications to Criterion 20 and remanding for new findings and conclusions on that issue, we are required to also review the ALJ's determination that The Heritage conformed with the review criteria and was, in fact, an approvable applicant. This is so because if, on remand, the ALJ determines that neither Liberty nor Britthaven was in conformity with Criterion 20, then The Heritage — if it satisfied Criterion 13(c) — would be entitled to the CON.

Criterion 13(c) provides as follows:

The applicant shall demonstrate the contribution of the proposed service in meeting the health-related needs of the elderly and of members of medically underserved groups, such as medically indigent or low income persons, Medicaid and Medicare recipients, racial and ethnic minorities, women, and handicapped persons, which have traditionally experienced difficulties in obtaining equal access to the proposed services, particularly those needs identified in the State Health Plan as deserving of priority. For the purpose of determining the extent to which the proposed service will be accessible, the applicant shall show

....

c. That the elderly and the medically underserved groups identified in this subdivision will be served by the applicant's proposed services and the extent to which each of these groups is expected to utilize the proposed services[.]

N.C. Gen. Stat. § 131E-183(a)(13)(c).

In its decision, the Agency found that The Heritage's projection that 55.4% of its total patient days¹⁰ would be provided to Medicaid recipients was inadequate in meeting the needs of the Medicaid population, thereby rendering it nonconforming with Criterion 13(c). In order to determine whether an applicant satisfies Criterion 13(c), the Agency's practice is to examine the applicant's projections for the services it will provide to medically underserved groups, including Medicaid recipients, and compare those projections with the state and county averages of

10. "Total patient days" is a unit of measurement utilized by health care entities. A facility's total patient days are calculated by assessing the number of patients that use the facility's services each day.

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the percentage of total patient days provided to the group in question. Because The Heritage's projection regarding Medicaid recipients was less than the Agency's calculation of the average percentage of total patient days provided to patients receiving Medicaid in nursing facilities within Wake County, the Agency found The Heritage to be nonconforming with Criterion 13(c).

In his Final Decision, the ALJ concluded that the manner in which the Agency computed the Wake County average for services provided to Medicaid recipients was improper. Specifically, the ALJ determined that the Agency "acted erroneously and arbitrarily in *excluding* nursing facility beds in hospital-affiliated nursing facilities to calculate the county average and using that average to find The Heritage nonconforming with [Criterion 13(c)]." (Emphasis added.) The ALJ found that The Heritage's projection, which was based on a calculation of the county average that *included* hospital-affiliated nursing facilities, constituted "sufficient Medicaid access" and demonstrated conformity with Criterion 13(c).

The Agency argues on appeal that the ALJ acted in excess of his statutory authority and erred as a matter of law by affording no deference to the Agency's process for determining conformity with Criterion 13(c) despite the explanation offered by the Agency to support its practice. We agree.

As we previously noted, an agency's interpretation of the statutes it is charged with administering is due deference when its interpretation is reasonable, and the amount of deference given to the agency interpretation depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade" *Good Hope*, 189 N.C. App. at 544, 659 S.E.2d at 463 (citation and quotation marks omitted). Indeed, the 2011 legislative amendments to the APA preserve this concept, specifically instructing the ALJ to consider the specialized knowledge of the Agency when deciding a contested case.

In each contested case the administrative law judge shall make a final decision or order that contains findings of fact and conclusions of law. The administrative law judge shall decide the case based upon the preponderance of the evidence, *giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.*

N.C. Gen. Stat. § 150B-34(a) (emphasis added).

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Here, Agency employees testified as to the reasoning behind its exclusion of hospital-affiliated facilities from its calculation of the county average. Frisone testified that hospital-affiliated nursing facility beds typically

have a different payor mix. They tend to have a much higher Medicare payor mix percentage and a much lower Medicaid. They typically admit the patient and then move them — they're moved to another facility or they go home. It's more likely in a hospital based facility than it is in a community nursing home.

She further explained that the Agency was particularly concerned with achieving access to nursing facilities for Medicaid recipients because "Medicaid patients have greater access problems in 2011" and have "historically had more trouble with access to nursing facility services." McKillip, the Agency employee who analyzed and reviewed each of the applications, likewise testified that the hospital-affiliated facilities were excluded from the calculation "because they have a different payor mix pattern that is not typical or not really comparable to the types of facilities that are being proposed in this review, which were all non-hospital affiliated freestanding facilities."

The ALJ rejected this rationale in his Final Decision. He noted that the Agency did not conduct an analysis of the admission patterns in Wake County or of the percentage of Medicaid recipients served by hospital-affiliated facilities as compared to other facilities before deciding to exclude hospital-affiliated nursing facilities from its calculation.

We believe the ALJ's implication that the Agency was required to specifically analyze the admission patterns of *all* Wake County nursing facilities — both hospital-affiliated and non-hospital-affiliated — disregards the specialized knowledge and expertise of the Agency concerning the typical payor mixes of particular facilities. The evidence presented at the hearing corroborated the Agency's assertion that hospital-affiliated facilities typically have significantly fewer Medicaid patients than other skilled nursing facilities within Wake County with an average 31.6% of the total patient days provided to Medicaid recipients at hospital-affiliated facilities compared to 61.8% at non-hospital-affiliated facilities. As such, we believe that the ALJ erred in failing to give deference to the Agency's reasonable explanation for its decision to exclude hospital-affiliated facilities from its calculation of the county average.

The ALJ further based his conclusion that the Agency's calculation of the county average was arbitrary and capricious on (1) testimony

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by Agency employees suggesting that the Agency might have included hospital-affiliated facilities in the county average if a hospital-affiliated nursing facility had applied for the CON; and (2) evidence of two prior Agency decisions from Wake County where the county averages appear to have included hospital-affiliated facilities.

Based on our examination of the record and the testimony of Agency employees, it appears that a number of factors are considered by the Agency when deciding whether hospital-affiliated facilities should be included in the calculation of the county average. For example, in smaller counties with fewer overall facilities, hospital-affiliated facilities are generally included in order to achieve a more balanced analysis while, conversely, in larger, more populated counties — which have many skilled nursing facilities — hospital-affiliated facilities are typically excluded as their different payor mix tends to artificially depress the county average.

The ALJ cited Smith's testimony that if hospital-affiliated nursing facilities apply for a CON, such facilities may be added "to the mix for a more balanced comparison." Frisone noted that this would likely not be the case in Wake County, however, because of its large population and the fact that "there are enough facilities to where you can look at the distribution" without including hospitals and artificially skewing the county average.

Given the Agency's explanation of its methodology and its purpose in assessing the county average in this manner, we reject the ALJ's conclusion that the Agency was unreasonable and arbitrary simply because it might have altered its calculation if the group of applicants included one or more hospital-affiliated nursing facilities. Indeed, we find it logical for the Agency to utilize an approach allowing for some degree of flexibility in striving to capture the most accurate picture of the services provided to Medicaid recipients within a county in accordance with the specialized knowledge and expertise of the Agency.

We also disagree with the ALJ's determination that the Agency acted erroneously and arbitrarily in excluding hospital-affiliated facilities from its calculations in light of evidence pointing to two prior occasions in which the Agency apparently accepted a calculation of the Medicaid average in Wake County that included hospital-affiliated nursing facilities. Based on our review of this evidence, it appears that these two incidents stemmed from non-competitive reviews where an individual applicant was awarded a CON to add or relocate nursing beds from existing facilities after proposing that over 70% of its total patient days

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would be provided to Medicaid recipients. The record does not reflect precisely why hospital-affiliated facilities were included in the county average in these two cases. However, we cannot conclude based on the mere existence of these two past cases — without more — that the Agency is no longer entitled to the deference that it would otherwise be due in its interpretation of Criterion 13(c). Indeed, the record also contains evidence of numerous decisions in which the Agency utilized the same method of determining conformity with Criterion 13(c) that it used here.

In sum, we conclude that the Agency’s method of assessing conformity with Criterion 13(c) was reasonable, based on facts and inferences within the specialized knowledge of the Agency, and therefore entitled to deference. Accordingly, we reverse the ALJ’s determination that The Heritage conformed with Criterion 13(c).

Conclusion

For the reasons stated above, we vacate the ALJ’s Final Decision and remand this case for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges ELMORE and McCULLOUGH concur.

IN THE MATTER OF APPEAL OF PARKDALE MILLS AND PARKDALE AMERICA FROM THE
DECISIONS OF THE DAVIDSON COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING
THE VALUATION OF CERTAIN REAL PROPERTY FOR THE TAX YEAR 2007

No. COA14-763

Filed 7 April 2015

**1. Real Property—Property Tax Commission—remand order—
additional hearings—plain language**

On remand from the Court of Appeals, the Property Tax Commission did not err by failing to conduct additional hearings. The remand order stated that “the Commission shall conduct additional hearings *as necessary* and make further findings of fact and conclusions of law.” By its plain language, the order did not mandate that the Commission conduct additional hearings.

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2. Appeal and Error—failure to cite authority

The Court of Appeals declined to address the County's argument that the Property Tax Commission erred on remand by accepting the Taxpayer's argument that the County had already lost its case. The County cited no authority in support of its contention.

3. Real Property—Property Tax Commission—conflicting evidence

The Property Tax Commission did not err by adopting findings contrary to the record. Both the County and the Taxpayer presented substantial evidence, and the Court of Appeals is not permitted to replace the judgment of the Commission with its own.

Judge DILLON concurring in separate opinion.

Appeal by respondent Davidson County from final decision on second remand entered 8 April 2014 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 19 November 2014.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker and Jamie S. Schwedler, for respondent.

Bell, Davis & Pitt, PA, by John A. Cocklereece, Jr., and Justin M. Hardy, for taxpayer.

North Carolina Association of County Commissioners, by Amy Bason and Casandra Skinner, for amicus curiae.

BRYANT, Judge.

Where a directive of this Court instructs a lower tribunal that the lower tribunal “shall conduct hearings *as necessary*,” the plain language of such a directive indicates that the lower tribunal may, but is not required to, conduct additional hearings. Where the Property Tax Commission's decision was supported by substantial evidence, the decision will be affirmed upon appeal, despite the presence of contrary evidence in the record.

Parkdale Mills and Parkdale America (“taxpayer”) own two textile manufacturing plants in Davidson County (“the County”). In January 2007, the County assessed the value of taxpayer's Lexington plant at \$6,776,160.00 and the value of the Thomasville Plant at \$3,620,080.00. In contrast, taxpayer's expert appraiser valued the properties at \$905,000.00

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and \$625,000.00, respectively. Upon appeal by taxpayer to the County's Board of Equalization and Review ("the Review Board"), the appraised values were reduced to \$5,040,429.00 and \$3,287,150.00, respectively. Taxpayer then appealed to the North Carolina Property Tax Commission ("the Commission") which, after a hearing, affirmed the Review Board's assessments of taxpayer's buildings on 3 November 2009.

Taxpayer appealed to this Court, which found that taxpayer had demonstrated that the County's appraisal values were arbitrary, capricious, or illegal, and that the burden of showing that these values were still proper had shifted to the County. This Court then found that the Commission had failed to properly apply the burden-shifting framework as required by not making findings of fact and conclusions of law showing how the County's valuations were still proper despite evidence that these values were arbitrary, capricious, or illegal. We therefore vacated and remanded this case to the Commission with instructions that it "may conduct additional hearings on this matter if it deems them necessary." *In re Appeal of Parkdale Am.*, 212 N.C. App. 192, 198, 710 S.E.2d 449, 453 (2011) ("*Parkdale I*") (emphasis added). The Commission was further instructed that, upon remand, it "*shall* make specific findings of fact and conclusions of law explaining how it weighed the evidence to reach its conclusions using the burden-shifting framework" as articulated in the opinion. *Id.*

Upon remand, no additional hearings were conducted, but a new final decision was entered. By final decision upon remand, entered 23 May 2012, the Commission re-affirmed the appraisal values of taxpayer's plants at \$5,040,429.00 and \$3,287,150.00, respectively. Taxpayer again appealed the Commission's decision to this Court, which agreed with taxpayer that the Commission had again failed "to alleviate this Court's lack of confidence that the County has, in fact, carried its burden." *In re Parkdale Mills & Parkdale Am.*, ___ N.C. App. ___, ___, 741 S.E.2d 416, 421 (2013) ("*Parkdale II*"). This Court went on to note in *Parkdale II* that

[a]lthough we make no finding on appeal here regarding the true value of the property, this Court is troubled by the substantial discrepancy between [taxpayer's] assessed value and the County's assessed value. *On remand, the Commission shall conduct additional hearings as necessary and make further findings of fact and conclusions of law in order to reconcile this discrepancy.* If the County cannot carry its assigned burden, or if the Commission again fails to rectify the inadequacies of its Final Decision, this Court may exercise its prerogative

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to remand for yet a third time with specific instructions for the Commission to adopt [taxpayer's] valuation of the property as, unlike the County's valuation, it has not been held to be "arbitrary."

Id. at ___, 741 S.E.2d at 422 (citation omitted) (emphasis added).

On second remand to the Commission, taxpayer filed a motion to limit the scope of the hearing to the record created during the initial hearing and as presented to this Court in *Parkdale I*. By order entered 16 October, the Commission granted taxpayer's motion.

After conducting a hearing on 19 November, the Commission issued its final decision on second remand on 8 April 2014. In its decision, the Commission found that the previous decisions of the Review Board were erroneous and that the true value of taxpayer's plants were \$905,000.00 and \$625,000.00, respectively. The County appeals.

On appeal, the County raises three issues as to whether the Commission erred in (I) not conducting additional hearings on second remand; (II) in accepting taxpayer's argument that the County had already lost its case; and (III) in adopting findings that are contrary to the record.

I.

[1] The County argues that the Commission erred in not conducting additional hearings on second remand. We disagree.

Pursuant to North Carolina General Statutes, section 105-345.2,

[w]hen reviewing decisions of the Commission, this Court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of statutory authority or jurisdiction of the Commission; or
- (3) Made upon unlawful proceedings; or
- (4) Affected by other errors of law; or

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(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

Parkdale II, ___ N.C. App. at ___, 741 S.E.2d at 418—19 (citing N.C. Gen. Stat. § 105-345.2(b) (201[3])).

“An act is arbitrary when it is done without adequate determining principle[.]” *In re Hous. Auth. of City of Salisbury*, 235 N.C. 463, 468, 70 S.E.2d 500, 503 (1952) (citations omitted). “Determination of whether conduct is arbitrary and capricious or an abuse of discretion is a conclusion of law.” *Transcon. Gas Pipe Line Corp. v. Calco Enters.*, 132 N.C. App. 237, 244, 511 S.E.2d 671, 677 (1999) (citation omitted).

This Court reviews decisions of the Commission under the whole record test to “determine whether an administrative decision has a rational basis in the evidence.” *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 127 (1981) (citation omitted).

The “whole record” test does not allow the reviewing court to replace the [Commission’s] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. On the other hand, the “whole record” rule requires the court, in determining the substantiality of evidence supporting the [Commission’s] decision, to take into account whatever in the record fairly detracts from the weight of the [Commission’s] evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the [Commission’s] result, without taking into account the contradictory evidence or evidence from which conflicting inferences could be drawn.

Id. at 87-88, 283 S.E.2d at 127 (citations and quotations omitted). However, this Court cannot reweigh the evidence presented and substitute its evaluation for that of the Commission’s. *In re AMP*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975) (citation omitted). “If the Commission’s decision, considered in the light of the foregoing rules, is supported by substantial evidence, it cannot be overturned.” *In re Philip Morris U.S.A.*, 130 N.C. App. 529, 533, 503 S.E.2d 679, 682 (1998) (citations omitted).

The County contends the Commission erred in accepting taxpayer’s argument that it could not hear evidence because the Commission

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was bound by this Court's directive to conduct additional hearings. The County's argument lacks merit though, as this Court clearly stated in *Parkdale II* that "[o]n remand, the Commission shall conduct additional hearings *as necessary* and make further findings of fact and conclusions of law[.]" *Parkdale II*, ___ N.C. App. at ___, 741 S.E.2d at 422 (emphasis added). "A mandate of an appellate court is binding upon [the trial court] and must be strictly followed without variation or departure." *McKinney v. McKinney*, ___ N.C. App. ___, ___, 745 S.E.2d 356, 358 (2013) (citation and quotation omitted), *review denied*, 2014 N.C. LEXIS 46, *review dismissed as moot*, 2014 N.C. LEXIS 50 (Jan. 23, 2014). Moreover, it is well-established that in discerning a mandate's intent, the plain language of the mandate controls. *See, e.g., First Bank v. S & R Grandview, L.L.C.*, ___ N.C. App. ___, ___, 755 S.E.2d 393, 394-95 (2014) (discussing how, in construing the intent of a statute, this Court is guided by the statute's plain language).

Here, this Court indicated that the Commission was to conduct further hearings *as necessary*. We disagree with the County's contention that the language of this directive, that the Commission "shall conduct additional hearings as necessary," meant that the Commission was required to conduct additional hearings because the word "shall" was used. Rather, this directive, taken as a whole, indicates that additional hearings were to be conducted if the Commission found such an action necessary in order to make further findings of fact and conclusions of law regarding the appraisal values of taxpayer's property. At no point did the Court in *Parkdale II* direct the Commission to take new evidence. *See* N.C. Gen. Stat. §105-345.1 (2013) ("No evidence shall be received at the hearing on appeal to the Court of Appeals but if any party shall satisfy the court that evidence has been discovered since the hearing before the Property Tax Commission that could not have been obtained for use at that hearing by the exercise of reasonable diligence, and will materially affect the merits of the case, the court *may*, in its discretion, remand the record and proceedings to the Commission with directions to take such subsequently discovered evidence" (emphasis added)). As such, this Court's directive to the Commission in *Parkdale II* was not a mandate requiring the Commission to conduct additional hearings. *See In re Appeals of S. Ry. Co.*, 313 N.C. 177, 183-84, 328 S.E.2d 235, 240 (1985) (discussing how N.C.G.S. § 105-345.1 does not require the taking of new evidence on remand to the Commission, and noting that where the evidence in the record is sufficient, this Court will not order new proceedings in order to give a party a second opportunity to bolster its case with new evidence); *Bailey v. N.C. Dept. of Mental Health*, 2 N.C. App. 645, 647-48, 163 S.E.2d 652, 654 (1968) (noting that

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where the order of a state agency was vacated and remanded for further consideration, the directive did not mandate that a new trial or trial *de novo* be conducted, nor did this directive either require or prohibit the state agency from taking new evidence).

The County further argues that because this Court vacated and remanded in *Parkdale II*, the language of “vacate and remand” was a directive ordering the Commission to conduct additional mandatory hearings. We disagree, for it has been settled by this Court that, for all practical purposes, the term “vacate” is synonymous with “remand,” as both terms generally instruct the trial court to set aside and review its prior order. *See In re Appeal of IBM Credit Corp.*, 222 N.C. App. 418, 426-27, 731 S.E.2d 444, 448-49, *review denied*, 366 N.C. 400, 735 S.E.2d 191 (2012). Here, the Commission had discretion to determine whether or not to conduct additional evidentiary hearings. There was no mandate to conduct new hearings; likewise, there was no mandate to enter an order solely on the record. The mandate was to enter proper findings of fact and conclusions of law to reconcile the huge discrepancy in valuation of taxpayer’s property. Therefore, in its final decision on second remand, the Commission did not abuse its discretion by not conducting additional hearings while abiding by the mandate.

Additionally, we note that although the County raises this argument concerning the Commission’s final decision on second remand, this Court’s directive to the Commission in *Parkdale I* was virtually identical to that now contested in *Parkdale II*, yet the County never raised this issue prior to its current appeal. In *Parkdale I*, this Court made it clear that the Commission had discretion to determine whether additional hearings were necessary: “[T]he Commission *may* conduct additional hearings if it deems them necessary . . . [and] *shall* make specific findings of fact and conclusions of law explaining how it weighed the evidence” *Parkdale I*, 212 N.C. App. at 198, 710 S.E.2d at 453 (emphasis added). However, no additional hearings were conducted, and the County never raised this issue regarding the meaning of the mandate in its appeal following *Parkdale I*. Accordingly, the County’s argument is overruled.

II.

[2] Next, the County contends that the Commission erred in accepting taxpayer’s argument that the County had already lost its case. However, while a review of the transcript does support the fact that taxpayer did make such an argument, the County cites no case law or other authority in support of its contention that it was error for the Commission to do

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so. Therefore, we decline to address this argument. *See* N.C. R. App. P. 28(b)(6) (2014) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”).

III.

[3] In its final argument, the County contends the Commission erred in adopting findings that are contrary to the record. We disagree.

As stated in *Issue I*, this Court reviews decisions of the Commission under the whole record test to “determine whether an administrative decision has a rational basis in the evidence.” *In re McElwee*, 304 N.C. at 87, 283 S.E.2d at 127 (citation omitted). However, this Court cannot reweigh the evidence presented and substitute its evaluation for that of the Commission’s. *In re AMP*, 287 N.C. at 562, 215 S.E.2d at 761 (citation omitted). “If the Commission’s decision . . . is supported by substantial evidence, it cannot be overturned.” *In re Philip Morris U.S.A.*, 130 N.C. App. at 533, 503 S.E.2d at 682 (citations omitted).

The County contends the Commission “erred in adopting a series of argumentative findings that are contrary to the substantial evidence of record.” Specifically, the County presents a broad argument, without citing specific findings of fact, that the Commission’s final decision on second remand was in error because, in general, the Commission’s findings of fact as to the County’s application of schedules of values, comparison sales data of properties similar to those of taxpayer’s, the operability of taxpayer’s properties, and adaptive reuse sales data, can be challenged by contrary evidence within the record.

A review of the record indicates that both the County and taxpayer presented substantial evidence to the Commission, including testimony regarding various methods of appraisal used by each party to determine the actual values of the properties. Although the County is correct that it presented contrary evidence as to the conditions and valuations of taxpayer’s properties, the record shows that taxpayer also presented substantial evidence regarding the conditions and valuations of its properties. Further, the Commission, after making numerous findings of fact and conclusions of law, determined that despite the County’s evidence, the County had not meet its burden in demonstrating that its method of valuation for taxpayer’s properties was proper. While this Court may consider competing or contradictory evidence in reviewing the Commission’s decision, this Court is not permitted “to replace the [Commission’s] judgment as between two reasonably conflicting views, even though th[is] [C]ourt could justifiably have reached a different

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result had the matter been before it *de novo*.” *In re McElwee*, 304 N.C. at 87-88, 283 S.E.2d at 127 (citation omitted).

Additionally, we note that the Commission, by making numerous findings of fact and conclusions of law as to the discrepancy between the County’s and taxpayer’s valuations of the properties, has followed the directive of this Court as stated in *Parkdale II*. *See Parkdale II*, ___ N.C. App. at ___, 741 S.E.2d at 422 (“On remand, the Commission shall conduct additional hearings as necessary and make further findings of fact and conclusions of law in order to reconcile this discrepancy [between taxpayer’s and the County’s assessed values for the properties].”).

As a final point, we note that even had the Commission failed to properly apply the burden-shifting framework, by adopting taxpayer’s valuations of the properties the Commission would have met this Court’s prerogative warning in *Parkdale II*. *See id.* (warning that “[i]f the County cannot carry its assigned burden, or if the Commission again fails to rectify the inadequacies of its Final Decision, this Court may exercise its prerogative to remand for yet a third time with specific instructions for the Commission to adopt [taxpayer’s] valuation of the property as, unlike the County’s valuation, it has not been held to be ‘arbitrary.’”). The County’s argument is, therefore, overruled.

AFFIRMED.

Judge DILLON concurring in separate opinion.

DILLON, Judge, concurring.

I concur with the majority in affirming the Final Decision on Second Remand of the Property Tax Commission. I write separately to address the *dicta* from *Parkdale II* quoted in the last paragraph of the majority’s opinion:

If the County cannot carry its assigned burden, or if the Commission again fails to rectify the inadequacies of its Final Decision, this Court may exercise its prerogative to remand for yet a third time with specific instructions for the Commission to adopt [taxpayer’s] valuation of the property as, unlike the County’s valuation, it has not been held to be ‘arbitrary.’

I do not believe that the above *dicta* should be read as a rule which *requires* the Commission to accept the taxpayer’s valuation simply

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because the County may fail to meet its burden (when applicable) that its valuation does not represent the true value of the property. *Parkdale I* and *Parkdale II* explain the burden-shifting framework the Commission is required to apply, which I believe is as follows:

The County's valuation is presumed to be correct.

The taxpayer, however, can rebut this presumption by producing competent evidence to show that the County's (1) methodology was either arbitrary or illegal, *and* (2) valuation was substantially higher than the true value of the property.

A rebuttal by the taxpayer does not *conclusively* establish that the County's valuation was in fact arbitrary or illegal or that its valuation was substantially higher than the true value of the property. Rather, the burden shifts back to the County to demonstrate that its valuation was correct.

The County's failure to meet its burden does not necessarily render the taxpayer's valuation to be correct. Rather, where the County fails to meet its burden, it is up to the Commission to weigh the evidence and to make a determination as to the property's true (market) value. It may be that the Commission concludes that *neither* valuation (offered by the County or the taxpayer) accurately reflects the property's true value and determines the true value be some other number. *See, e.g., In re Phillip Morris U.S.A.*, 130 N.C. App. 529, 538, 503 S.E.2d 679, 685 (1998) (after County concedes that it employed an arbitrary methodology, the Commission adopts value that is between value advocated by the County's expert and the value advocated by the taxpayer's expert).

In the present case, the Commission did make a finding that the valuations derived by the taxpayer's appraisal constituted "competent, material, and substantial evidence of the values" of the properties that are the subject matter of this appeal. This finding supports the Commission's ultimate determination of value. There was certainly conflicting evidence regarding the value of the subject properties from which the Commission could have determined that the subject properties' true value was somewhere between the value advocated by the County and the value advocated by the taxpayer. However, it is for the Commission – and not this Court – to weigh the evidence. Accordingly, I concur with the majority in affirming the Commission's order.

IN RE M.B.

[240 N.C. App. 140 (2015)]

IN THE MATTER OF M.B.

No. COA14-897

Filed 7 April 2015

1. Appeal and Error—appealability—writ of certiorari—incorrect date on notice of appeal

A juvenile's petition for a writ of certiorari as to the 22 October 2013 order based on an incorrect date was unnecessary, and thus was dismissed because a notice of appeal is not defective if intent to appeal can be fairly inferred.

2. Appeal and Error—appealability—writ of certiorari—notice of appeal—proper party—extraordinary writs—jurisdiction

A juvenile's petition for certiorari review as to the district court's 23 May 2014 order recognizing the Department of Social Services as a proper party was denied. Instead of filing notice of appeal from this order and moving to consolidate it with the already-pending appeal of the 22 October 2013 order, the juvenile's appellate counsel elected to pursue relief by petitioning for extraordinary writs from this Court. Consequently, the juvenile failed to meet the requirements of N.C.R. App. P. 3 and the Court of Appeals lacked jurisdiction to review the 23 May 2014 order.

3. Appeal and Error—motion to supplement record—denied

The Court of Appeals denied both motions to supplement the record in written orders filed 20 January 2015, reasoning that neither the 31 October 2013 order nor the subsequent abuse, neglect, and dependency orders were available to or relied upon by the district court when it concurred in a juvenile's readmission to a 24-hour psychiatric residential treatment facility after the 10 October 2013 hearing.

4. Juveniles—psychiatric residential treatment facility—ordered into custody in a second county—jurisdiction

The Court of Appeals' already held in *In re Phillips*, 99 N.C. App. 159 (1990), that where a juvenile is ordered into the custody of one county department of social services and then admitted to a psychiatric residential treatment facility in another county, the district court in the second county has jurisdiction over the admission as long as it does not conflict with the order of the prior court.

IN RE M.B.

[240 N.C. App. 140 (2015)]

5. Appeal and Error—appealability—mootness—voluntary admission of minor into treatment facility—capable of repetition

Although juvenile's appeal from a 22 October 2013 order continuing his readmission to a psychiatric residential treatment facility for up to 30 days where the juvenile was subsequently discharged before its expiration would normally be dismissed as moot, it was not moot because orders of voluntary admission of a minor to a 24-hour facility are "capable of repetition, yet evading review" given their short duration. The State has a great interest in preventing unwarranted admission of juveniles into these treatment facilities.

6. Juveniles—readmission to psychiatric treatment facility—sufficiency of evidence—no less restrictive measures available

The district court did not err by concurring in a juvenile's readmission to a psychiatric residential treatment facility (PRTF) based on alleged insufficient findings. There were no sufficient, less restrictive measures available for the juvenile's continued treatment. Further, the district court's order satisfied the requirements of N.C.G.S. § 122C-224.3 by indicating that it incorporated into its factual findings all matters set out in a therapist's court summary, which it in turn relied on for its conclusions that the juvenile was mentally ill, in need of continued treatment at a PRTF, and that less restrictive measures would not be sufficient.

7. Appeal and Error—appealability—de facto party—no prejudice

A juvenile suffered no prejudice as a result of the Department of Social Services' (DSS) participation during the 10 October 2013 hearing. Because the issue of whether the court erred by recognizing DSS as a *de facto* party in its 23 May 2014 order was unnecessary to this determination and was not properly preserved for review.

Appeal by Respondent-juvenile from order entered 22 October 2013 by Judge Donald Cureton, Jr., in Mecklenburg County District Court. Heard in the Court of Appeals 22 January 2015.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for Respondent-juvenile.

Deputy County Attorney Cathy L. Moore, for Durham County Department of Social Services.

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Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Parker Poe Adams & Bernstein LLP, by Matthew W. Wolfe, for petitioner Thompson Child & Family Focus.

STEPHENS, Judge.

Respondent-juvenile appeals from the Mecklenburg County District Court's 22 October 2013 order concurring in and ordering his readmission to a Level IV psychiatric residential treatment facility. Respondent-juvenile also seeks *certiorari* review of the court's subsequent 23 May 2014 order recognizing the Durham County Department of Social Services as a *de facto* party to the matter. After careful consideration, because we conclude that the court did not err in its 22 October 2013 order and that its 23 May 2014 order has not been properly preserved for our review, we affirm.

I. Facts and Procedural History

On 16 August 2012, Michael¹ was voluntarily admitted to Thompson Child and Family Focus ("Thompson"), a 24-hour psychiatric residential treatment facility ("PRTF") by the consent of his legal guardian, the Durham County Department of Social Services ("DSS"). Michael's admission was reviewed one week later by the Mecklenburg County District Court, which concurred in his initial admission and subsequently authorized his readmission to Thompson at six hearings between November 2012 and October 2013.

Michael was admitted to Thompson at the age of eleven following several incidents of inappropriate sexual behavior with other children. He suffered from a history of neglect by his biological parents, and was also sexually abused by several unidentified adult males, before being taken into DSS custody at the age of eight. Michael's treatment plan at Thompson called for reducing his physical and verbal aggression and decreasing his post-traumatic stress disorder symptoms through a combination of medication and individual and group therapy, with the goal of eventually stepping down his treatment to a lower level of care and transferring him to a therapeutic foster home upon discharge.

1. In accordance with Rule 3.1 of our Rules of Appellate Procedure, we refer to the juvenile by a pseudonym throughout this opinion to protect his privacy.

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As documented in the court summaries prepared by his therapist, Julia Sotile, Michael initially struggled to adjust to life at Thompson but gradually made progress toward attaining his treatment goals. Sotile's reports also documented her growing concerns with Michael's DSS guardian, Teresa Autry.

A. Michael's pre-October 2013 readmission hearings

In her court summary for Michael's uncontested January 2013 readmission hearing, Sotile noted that Michael had displayed great improvement in his behavior since she began working with him the previous October. Sotile described Michael as calm, compliant, and improving in his interactions with Thompson's staff and his peers there. In his therapy sessions, Michael remained reluctant to take responsibility for his sexual behaviors, displayed a preoccupation with and hyperawareness of sexual issues, and struggled to process his traumatic history. While his mother and siblings made supervised visits, DSS informed Michael's treatment team at Thompson that his permanent plan upon discharge had been changed to adoption with a preferred placement with his previous foster family, whom he visited once during Christmas. Sotile noted she had encouraged Autry to be clear with Michael so as not to set up any false expectations regarding his mother's role in his life.

In her court summary for Michael's uncontested April 2013 readmission hearing, Sotile noted that Michael had struggled since his last review. She explained that Michael was engaging in sexual behaviors with his peers, had difficulty taking ownership of his actions, and was increasingly defiant and disrespectful to Thompson's staff. In therapy, Michael expressed a great deal of anxiety and confusion regarding his sexual behaviors and his family situation and traumatic history. Sotile noted that he seemed deeply worried about whether he would be allowed to return to his mother's care, blamed himself for the majority of his family's problems, and had disclosed to Autry that some inappropriate discipline had taken place at the foster home where he had stayed before his admission to Thompson. Autry's response was to tell Michael that she did not believe his allegations but had told his previous foster parents about them, and that as a result, they had decided that they no longer wanted to be considered as a placement option for him. Sotile noted her dismay to Autry that sharing these opinions with Michael and blaming him for the disruption of his previous foster placement might cause him damage, given his struggles with isolation and loneliness. Autry also requested that Michael's phone contact with his mother, against whom DSS had recently moved for a TPR, be limited to once a week during therapy sessions to monitor for inappropriate

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conversations. Michael had previously asked that Autry contact him weekly by phone, but Sotile's report explained that Autry had been inconsistent in her communications with him and expressed concern that Michael's "sexual behaviors and other shows of defiance seem to be increasing in response to an overall sense of instability."

In her court summary for Michael's uncontested July 2013 readmission hearing, Sotile noted that Michael seemed to be benefiting from the opportunity to establish meaningful, healthy relationships with Thompson's staff and his peers, but was struggling with his attitude and behavior. Specifically, Michael was acting increasingly defiant and disrespectful and making inappropriate, hypersexual comments toward female staff members. He also struggled to follow directions at school and became distracted and easily frustrated when he did not understand his assignments. In therapy, Michael presented as hypersexual with his therapist by asking inappropriate questions and violating personal boundaries. He also seemed depressed and expressed feelings of hopelessness and helplessness regarding his family situation. However, Sotile also noted that Michael had recently taken tremendous steps toward acknowledging his past behaviors. Sotile further explained that Michael continued to express a desire for increased outside support and connection, and had repeatedly asked that Autry call him once a week, but that despite assuring him she would call weekly and establishing times to do so, Autry had consistently failed to call, which typically left Michael very upset. Sotile noted that Michael's treatment team at Thompson had repeatedly asked Autry not to commit to making these calls "as she is very clearly unwilling to uphold this [commitment]." By contrast, Michael's guardian *ad litem* offered to call him every weekend and had done so on a regular basis, and Sotile noted that Michael seemed to benefit from this contact. Michael's treatment team at Thompson also asked Autry to give Michael notice if she would not be able to attend certain meetings in person or take him off campus as previously scheduled, given that "[s]he has also not been able to adhere to this and at times will give [Michael] little to no notice" that she will not be coming. Michael's discharge plan continued to call for stepping down to a lower level of care upon completion of his treatment goals at Thompson, with an anticipated date of discharge in late August pending an updated psychological evaluation. Autry had stated that she was looking for a foster placement but that she did not feel it would be feasible to identify a family to begin working with while Michael remained in a PRTE. In the section of her court summary designated "Concerns Noted," Sotile reported that "[] Autry's ongoing inconsistency and lack of communication with [Michael] is of great concern to his [Thompson treatment]

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team. [Michael] is a child with very minimal outside support. [] Autry is a vital figure in his life, and her lack of involvement and contact is concerning.”

In her court summary for Michael’s September 2013 readmission hearing, Sotile reported that although Michael struggled at times with defiant and disrespectful behavior toward Thompson’s staff, especially when faced with tasks he did not like, he had not displayed any verbal or physical aggression, or made any threats to harm himself or others, since his last review. However, as Sotile noted, there had been incidents when Michael acted flirtatiously toward his peers, and in therapy, he continued to present as hypersexual by asking her inappropriate questions, and expressed anger over his family situation. Nevertheless, Sotile explained that Michael was making progress toward taking ownership of his past sexual behaviors, improving at acknowledging his struggles with behaving respectfully, and getting better at expressing and tolerating frustration. Sotile also reported that, given Michael’s ongoing struggles with emotion regulation and sexual preoccupation, his discharge plan had been amended. After noting Michael had recently undergone a psychosexual evaluation, Sotile recommended that Michael be stepped down to a Level III facility “specific to adolescents with sexual behavior problems,” with an identified discharge date of 30 September 2013. However, Sotile continued to express concern over Autry’s “ongoing inconsistency and lack of communication with [Michael].”

After a hearing held 12 September 2013, the Mecklenburg County District Court adopted Sotile’s summary into its findings of fact; entered conclusions of law that Michael was mentally ill, in need of continued treatment, and that less restrictive measures would not be sufficient; and concurred in Michael’s readmission to Thompson for up to 30 days so that adequate plans could be made for his discharge to a Level III facility. The court set Michael’s next hearing date for 10 October 2013.

B. Michael’s October 2013 readmission hearing

In her court summary for Michael’s October 2013 readmission hearing, Sotile reported that although Michael continued to struggle with disrespectful and defiant behavior toward Thompson’s staff and required frequent redirection from engaging in attention-seeking behavior during structured activities, he had not displayed any aggressive, self-harming, or overt sexual behavior toward his peers. However, Sotile noted that in therapy, Michael remained sexually preoccupied, struggled with feelings of guilt over his family situation, and expressed frustration with the plan to discharge him to a Level III facility instead of a foster home.

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Sotile explained that while both Thompson and Autry had made efforts since the last hearing to secure a Level III placement for Michael, their attempts had proven unsuccessful so far. Moreover, after receiving the results of Michael's psychosexual evaluation by Dr. Keith Hersh, who found that Michael's IQ fell in the Extremely Low range and consequently recommended that he remain in a highly structured and supervised environment, Autry decided that upon discharge, Michael should transition to another Level IV PRTF. Sotile noted that Michael's IQ score was significantly lower than anticipated and theorized that the actions she had previously considered defiant may have in fact been the result of a genuine lack of understanding and comprehension. Further, Sotile reiterated that, despite Dr. Hersh's recommendation, she believed Michael would be best served by treatment in a Level III facility, and that a lateral transfer to another PRTF would be very discouraging for him at this point in his treatment. As Sotile explained,

[a]lthough [Michael] continues to struggle to take ownership of his past behaviors, he has not engaged in any aggressive or self-harming behaviors during his time at [Thompson]. He has proven that he can remain physically safe, even while angry or agitated. It is clear that [Michael] is in need of ongoing therapeutic services. However, it is recommended that these services reflect his individual needs. Another PRTF that does not target treatment of children with intellectual disabilities would not seem to be an effective change in venue. If [Michael] is placed in a Level III facility, he can be enrolled in therapeutic services more specific to his needs, with a clinician experienced in serving a similar population of client.

Ultimately, Sotile recommended that although she believed Michael

has earned the opportunity to step down to a lower level of care[, i]t is strongly recommended that [Michael] not discharge until his placement is secure within a facility that will provide adequate supervision and structure. It is not recommended that [Michael] discharge into respite care or emergency placement prior to transitioning to a Level III facility. More time is being requested in an effort to ensure [Michael's] ongoing success and safety.

Sotile again noted her concerns regarding Autry's lack of involvement in Michael's case.

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At the ensuing 10 October 2013 readmission hearing in Mecklenburg County District Court, Michael contested his readmission to Thompson. Before the hearing, Michael's appointed counsel had contacted DSS to inquire into Autry's availability to testify, and had been informed by DSS's counsel, Cathy L. Moore, that she would need to obtain a subpoena to secure Autry's participation. Pursuant to that subpoena, Autry appeared at the 10 October hearing via telephone, accompanied by Moore, who identified herself as "deputy attorney for Durham or DSS" and declined to be sworn in as a witness because, as she informed the court, "I don't think I'm—I'm going to be testifying. I'm going to be a lawyer." After indicating this would be allowed, the court called for testimony from Sotile.

Sotile informed the court that Michael had not displayed any aggressive, self-harming, or overtly sexual behavior since the previous hearing and had been working to accept her discharge recommendation to step down to a Level III facility. She also reported that Dr. Hersh had completed an updated psychosexual evaluation of Michael, which she explained is generally standard procedure prior to discharge, and that everyone had agreed Michael needed to have one in this case. However, Sotile further explained that, given the complications in finding a post-discharge placement for Michael, her recommendation "at this time" was for him to "remain with Thompson until we have a clearer understanding of where he will be discharged to." When Michael's counsel asked Sotile whether he met the criteria for a Level IV facility, Sotile responded that while Michael still needed continued structure and supervision, his behavior since the last hearing did not reflect the need for a Level IV facility, and that her discharge recommendation of stepping down to a Level III facility, assuming one was available and would accept Michael, had not changed since September.

The court then allowed DSS's counsel to cross-examine Sotile about Dr. Hersh's psychosexual evaluation and recommendation that Michael be transferred to a Level IV PRTF. Sotile stated that she disagreed with Hersh's recommendation because she believed that transferring Michael to another Level IV PRTF would be "detrimental not only to his motivation in treatment but also just sort of his overall sense of hope and well being," and that it would therefore be much better to transfer him to a Level III facility capable of addressing both his sexual behavior and his low IQ. Although Sotile was unaware of any available placements at Level III facilities suited to Michael's specific needs, she explained this problem could be alleviated by placing him in one and then "identifying

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[an] outpatient clinician [who] can provide those targeted services while allowing for the structure and supervision of a [Level III] facility.”

After Sotile’s testimony, the court noted it had not yet reviewed or been aware of Dr. Hersh’s psychosexual evaluation, but expressed concern over the differing recommendations as to what level of facility Michael should be placed in after his discharge from Thompson. The court then called for testimony regarding discharge planning from Michael’s case manager, Valisha Vanderpool, who explained that the process is “pretty much driven by the guardian,” and that while her job was to look for placement at appropriate facilities based on recommendations by clinicians at Thompson, she could not actually contact any facilities until she had consent from the child’s legal guardian. In Michael’s case, Vanderpool explained, she had been looking for Level III placements pursuant to Sotile’s recommendation, which had proven difficult because many Level III facilities within Thompson’s coverage network do not address sexualized behaviors; however, Vanderpool had found at least one opening at a facility that employed an outpatient therapist who could address Michael’s issues, and had sent a consent form to Autry for her consent as Michael’s guardian, but Autry never followed up with her. As Vanderpool noted, it was Autry’s responsibility to look for placements outside Thompson’s network in the hopes of setting up an out-of-network placement, but at some point after the September hearing, Autry switched gears and started focusing on Level IV PRTF placements for Michael, which “took away from us pursuing an appropriate [L]evel [III] placement” and “kind of just prolonged [the] process.” The court then allowed DSS’s counsel to cross-examine Vanderpool about whether her pursuit of a Level III placement for Michael was complicated by his dual diagnosis of sexualized behavior and intellectual disability; Vanderpool acknowledged that it had been, but also explained that Autry had “switched gears” to focusing on placement at another Level IV PRTF even before Dr. Hersh made his psychosexual evaluation and recommendations.

When the court called Autry to testify, she admitted that despite the September recommendation that Michael be discharged to a Level III facility, she had begun looking into Level IV PRTF placements before receiving Dr. Hersh’s evaluation because she thought one might be available sooner. Autry also testified that, after receiving Dr. Hersh’s evaluation, her focus switched entirely to Level IV placements, in part because the care coordinator from DSS’s managed care organization had instructed her that before applying to any Level III facilities, she would first need to apply and get denied by all available Level IV

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PRTFs. This led the court to remark that Autry did not appear to be following proper procedures, and when the court inquired whether a Care Review had been conducted to address the conflicting recommendations for Michael's placement upon discharge in light of the new information from Dr. Hersh's evaluation, Autry replied in the negative. However, Autry explained that she had recently found a placement for Michael at a Level IV PRTF in South Carolina, and that the only thing holding up his transfer was Thompson's refusal to sign a certificate of need, based on its recommendation that Michael be transferred only to a Level III facility.

The court then allowed DSS's counsel to examine Autry about an instance when Michael displayed sexualized behavior that Sotile had previously mentioned in her August court summary. Autry further testified that she believed the Level IV PRTF she had located in South Carolina would best fit Michael's needs, and that she was exploring ways to secure his placement there without Thompson's approval, but also opined that he should stay in Thompson until a new discharge plan could be agreed upon because "[i]f [Michael] were to be discharged today, we would have to put him in a rapid response bed. That supervision may not be the level that he needs right now, and it may cause more problems than what he's already facing right now." When DSS's counsel asked Autry whether it would be possible to hold a Care Review to resolve the differing recommendations of Sotile and Dr. Hersh by the end of the month if the court concurred in readmitting Michael to Thompson for an additional thirty days, Michael's counsel objected that DSS was not a party to the matter and consequently had no standing to make recommendations. In overruling this objection, the court explained that it would be appropriate for Autry to make a recommendation given her status as Michael's legal guardian. Autry then testified that "[i]f we had an extra 30 days, yes, we could definitely get a Care Review."

Toward the end of the hearing, the court expressed its concerns over the conflicting recommendations for Michael's treatment and the lack of progress in finding an appropriate post-discharge placement for him, stating:

THE COURT: I really don't think I have much of a[n] option because I think if I discharge [Michael], that means he goes back into [DSS's] authority.

[DSS's counsel]: That's correct.

THE COURT: And then he just goes wherever. And that can't be good for him right now. I mean, I just don't think

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that's—that's going to help him out. Could it possibly put some pressure on you guys to find a place? Yes. But I could also see that that could result in maybe a rash judgment as well. Or that in haste because you're looking for the first available facility, and that's not what he needs either. He needs the facility that's really going to treat his needs and the services that are really going to treat his needs.

After Michael's counsel subsequently objected to his continued stay at Thompson due to his failure to meet the criteria for remaining in a Level IV PRTF based on Sotile's report, the court noted that even Sotile recognized that simply discharging him "is just not an option right now . . . because we just don't have [the appropriate facility where Michael could obtain a] lower level of care identified yet." In the summation it provided at the close of the hearing, and in the written order it subsequently filed on 22 October 2013, the court concluded—based on findings of fact incorporating Sotile's court summary and additional findings of fact describing the testimony taken during the 10 October hearing—that Michael was mentally ill and in need of continued treatment at Thompson until a lower level of care could be identified, and thus ordered that Michael remain at Thompson for up to another 30 days. The court further noted that it could not ignore the conflict between Sotile's recommendation and Hersh's evaluation, and thus ordered that a Care Review be conducted in order to resolve that conflict, with instructions to look first for an appropriate Level III facility before exploring options for transfer to another Level IV PRTF.

Michael was discharged from Thompson on 7 November 2013 and his counsel filed notice of appeal the following day to challenge the court's order concurring in his readmission, but mistakenly stated that the court's order was filed on 13 October 2013. On 9 December 2013, Michael's counsel filed an amended notice of appeal to correct the filing date of the order appealed from to 22 October 2013. Although Michael's counsel served the first notice of appeal on both Thompson and DSS, the amended notice of appeal was served only on Thompson.

On 30 April 2014, DSS filed a motion to dismiss Michael's appeal for failure to serve a necessary party—namely, DSS. In the alternative, DSS requested that it be served with appellate filings. On 7 May 2014, Michael replied by filing a motion to strike DSS's motion to dismiss, arguing that: (a) DSS lacked standing to bring such a motion because it was not a party to the matter; (b) DSS's motion did not comply with Rule 25 of our Rules of Appellate Procedure and was thus not properly before the court; and (c) DSS's motion to dismiss did not identify any substantial

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violations of our Rules of Appellate Procedure. After hearings held on 5 May 2014 and 22 May 2014, the court entered an order on 23 May 2014 denying DSS's motion to dismiss the appeal, but granting the alternative relief requested by ordering Michael to serve DSS with appellate filings because it had treated DSS as a party during the 10 October 2013 readmission hearing when it permitted its counsel to present evidence, cross-examine witnesses, and make arguments. Although Michael's appellate counsel failed to file a notice of appeal from that order, she did file an emergency motion with this Court on 23 May 2014 seeking a temporary stay of the district court's order recognizing DSS as a party and also applied for writs of *supersedeas* and *mandamus* to vacate that order. On 27 May 2014, this Court dismissed Michael's motion for a temporary stay. On 9 June 2014, this Court denied Michael's motion for writs of *supersedeas* and *mandamus*.

On 8 August 2014, the parties filed a stipulation with this Court to settle the record on appeal. In his appellant brief filed 17 October 2014, Michael sought to challenge both the district court's 22 October 2013 order concurring in his readmission and its 23 May 2014 order denying DSS's motion to dismiss but recognizing DSS as a party. In its appellee brief filed 17 November 2014, DSS argued that neither of these two issues was properly preserved for this Court's review in light of the errors contained in Michael's original notice of appeal and the fact that Michael failed to file any notice of appeal regarding the district court's 23 May 2014 order. On 12 December 2014, out of an abundance of caution, Michael filed a petition for writ of *certiorari* asking this Court to permit full appellate review of both orders.

[1] After careful consideration, we conclude first that Michael's petition for a writ of *certiorari* as to the 22 October 2013 order is unnecessary, and thus is dismissed, because the issue was properly preserved for our review. Although Michael's original notice of appeal listed an incorrect filing date for the order appealed from, this Court's prior holdings make clear that a notice of appeal is not defective if "intent to appeal can be fairly inferred." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011). Clearly, Michael's intent to appeal from the order entered in connection with the 10 October 2013 hearing can be fairly inferred. Moreover, any potential defect was cured when Michael filed his amended notice of appeal. DSS argues further that Michael's notice of appeal was defective because he failed to serve DSS with his amended notice. This argument fails because DSS was not formally recognized as a proper party to this matter until the court's 23 May 2014 order, and because DSS already had notice of Michael's intent

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to appeal based on the original notice he provided as a courtesy to his legal guardian.

[2] We deny Michael's petition for *certiorari* review as to the district court's 23 May 2014 order recognizing DSS as a proper party. Instead of filing notice of appeal from this order and moving to consolidate it with the already-pending appeal of the 22 October 2013 order, Michael's appellate counsel elected to pursue relief by petitioning for extraordinary writs from this Court. Consequently, Michael has failed to meet the requirements of N.C.R. App. P. 3, which means this Court lacks jurisdiction to review the 23 May 2014 order. *See, e.g., Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) ("Without proper notice of appeal, this Court acquires no jurisdiction.") (citation omitted). Michael's appellate counsel attempts to invoke our jurisdiction through Rule 21, which provides in relevant part that "[t]he writ of *certiorari* may be issued in appropriate circumstances . . . when the right to prosecute an appeal has been lost by failure to take timely action," and Rule 2, which allows this Court to suspend the requirements of Rule 3 "to prevent manifest injustice." *See* N.C.R. App. P. 2; *see also* N.C.R. App. P. 21. However, "[t]he provisions of Rule 2 are discretionary, and cannot be used to confer jurisdiction upon this Court in the absence of jurisdiction." *Carolinas Med. Cntr. v. Emp'rs & Carriers Listed in Exhibit A*, 172 N.C. App. 549, 554, 616 S.E.2d 588, 592 (2005). Further, while Michael argues that his notice of appeal from the 22 October 2013 order sufficiently conveyed his intent to appeal the district court's *de facto* recognition of DSS as a party during the readmission hearing, which he contends was prejudicial error, we do not believe Michael's notice of appeal of an order from October can be "fairly inferred" to include an order that was not entered until seven months later. *Cf. Von Ramm*, 99 N.C. App. at 156, 392 S.E.2d at 424. Moreover, while this appears to be an issue of first impression, we conclude for the reasons discussed *infra* that denying Michael's petition will not result in manifest injustice because this issue's determination is not relevant to our resolution of Michael's appeal of the district court's 22 October 2013 order, which is the only issue that is properly before us. Accordingly, Michael's petition for a writ of *certiorari* is denied.

[3] In addition, both Michael and DSS subsequently filed motions with this Court seeking to supplement the record on appeal. First, Michael sought to add the district court's 31 October 2013 order discharging him from Thompson. Although Michael never filed a timely notice of appeal from that order, he argued that it would better contextualize both his clinical condition and the unavailability of an alternative placement

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in a less restrictive setting as of the 10 October 2013 readmission hearing. For its part, DSS sought to supplement the record with two orders from Michael's abuse, neglect, and dependency proceeding in Durham County entered in April and October 2014. After careful consideration, this Court denied both motions to supplement the record in written orders filed 20 January 2015, reasoning that neither the 31 October 2013 order nor the subsequent A/N/D orders were available to or relied upon by the district court when it concurred in Michael's readmission to Thompson after the 10 October 2013 hearing.

*II. Analysis**A. The district court exercised proper subject matter jurisdiction*

[4] At the outset, we must address DSS's argument that the Mecklenburg County District Court lacked subject matter jurisdiction to concur in Michael's readmission to Thompson. Specifically, DSS contends that this Court must vacate and dismiss the district court's 22 October 2013 order because Michael's case arose in Durham and Chapter 7B of our General Statutes: (a) confers exclusive original and continuing jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent on the trial court of the county where the case arises until the cause is fully and completely determined; (b) automatically stays the issue of custody in any other civil action involving the juvenile; and (c) provides an extensive statutory scheme to review the custody, placement, and treatment of juveniles, which typically supersedes both our rules of civil procedure and other statutory schemes if they conflict. Although DSS failed to raise this argument during the 10 October 2013 hearing or either of the hearings held in May 2014, "[t]he question of subject matter jurisdiction may be raised at any point in the proceeding." *Sloop v. Friberg*, 70 N.C. App. 690, 692, 320 S.E.2d 921, 923 (1984). Nevertheless, in light of our prior holding in *In re Phillips*, 99 N.C. App. 159, 162, 392 S.E.2d 407, 409 (1990) (holding that where a juvenile is ordered into the custody of one county department of social services and then admitted to a PRTF in another county, the district court in the second county has jurisdiction over the admission as long as it does not conflict with the order of the prior court), we conclude DSS's argument is without merit.

B. This appeal is not moot

[5] Because the district court's 22 October 2013 order only continued Michael's readmission to Thompson for up to 30 days and Michael was subsequently discharged before its expiration, this appeal would normally be dismissed as moot. See *In re A.N.B.*, __ N.C. App. __, __,

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754 S.E.2d 442, 445 (2014) (“The general rule is that an appeal presenting a question which has become moot will be dismissed.”) (citation and internal quotation marks omitted). However, despite the general rule, this Court “may review cases that are otherwise moot but are capable of repetition, yet evading review” and further “has a duty to address an otherwise moot case when the question involved is a matter of public interest.” *Id.* (citations and internal quotation marks omitted). Indeed, this Court has previously recognized that orders of voluntary admission of a minor to a 24-hour facility are “capable of repetition, yet evading review” given their short duration, and that the State has a “great interest in preventing unwarranted admission of juveniles into these treatment facilities.” *Id.* We therefore hold that Michael’s appeal is properly before us.

C. The district court did not err in concurring in Michael’s readmission to Thompson

[6] Michael argues that the district court erred in concurring in his readmission to Thompson, and thus violated his constitutionally protected liberty interest in being free from unlawful restraint, because certain additional findings of fact contained in the court’s 22 October 2013 order do not support its ultimate finding that he needed continued treatment at Thompson in its restrictive environment. Citing our prior decisions holding that, in the context of civil commitments, it is reversible error for a district court to make insufficient factual findings in support of its legal conclusions, *see, e.g., id.* at ___, 754 S.E.2d at 451, Michael argues that this Court must vacate the trial court’s 22 October 2013 order. We disagree.

This Court recently indicated that voluntary commitment orders should be reviewed under the same standard used for involuntary commitments. *See In re C.W.F.*, ___ N.C. App. ___, ___, 753 S.E.2d 736, 738 (2014), *disc. review improvidently allowed*, ___ N.C. ___, 768 S.E.2d 292 (2015). In reviewing commitment orders, we “determine whether there was any competent evidence to support the facts recorded in the commitment order and whether the trial court’s ultimate findings . . . were supported by the facts recorded in the order.” *In re Allison*, 216 N.C. App. 297, 299, 715 S.E.2d 912, 914 (2011) (citation and internal quotation marks omitted; emphasis in original).

Section 122C-2 of our General Statutes provides that

[t]he policy of the State is to assist individuals with needs for mental health, developmental disabilities, and substance abuse services in ways consistent with the dignity,

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rights, and responsibilities of all North Carolina citizens. Within available resources, it is the obligation of State and local government to provide mental health, developmental disabilities, and substance abuse services through a delivery system designed to meet the needs of clients in the least restrictive, therapeutically most appropriate setting available and to maximize their quality of life.

N.C. Gen. Stat. § 122C-2 (2013). In the context of voluntary commitments, section 122C-224.3(f) provides in relevant part that, for a minor to be readmitted to a PRTF, the court must find by clear, cogent, and convincing evidence that the minor is “(1) mentally ill or a substance abuser and (2) in need of further treatment at the 24-hour facility to which he has been admitted.” *Id.* § 122C-224.3(f). Moreover, the statute provides that “[f]urther treatment at the admitting facility should be undertaken only when lesser measures will be insufficient.” *Id.*

Here, Michael contends that the district court’s concurrence in his readmission was driven more by DSS’s bureaucratic failings than the evidence before the court and was therefore unsupported by the additional findings of fact contained in its 22 October 2013 order that: (1) Sotile believed Michael did not meet the clinical conditions to remain in a PRTF; (2) DSS and Thompson failed to adequately pursue placement at a less restrictive Level III facility; and (3) the search for an appropriate Level III placement should be exhausted before considering transferring Michael to another Level IV PRTF. Based on these findings, Michael argues that he did not meet the statutory requirements for continued admission provided by section 122C-224.3. Specifically, Michael argues that although there was no question that he was mentally ill at the time of the 10 October 2013 hearing, Sotile’s recommendation that he be discharged to a Level III facility showed that he no longer needed treatment at Thompson and that “less restrictive measures” for his treatment would have been sufficient. While acknowledging that Sotile also recommended that he remain at Thompson until his next placement at a lower level facility could be secured, Michael emphasizes the plain language of section 122C-224.3, which he contends clearly and unambiguously deals with clinical requirements only and does not permit readmission for purely administrative reasons, such as Autry’s failure to timely and adequately pursue a post-discharge placement for him.

Michael’s argument fails, however, because it rests upon a literal interpretation of section 122C-224.3(f)’s provision that “[f]urther treatment at the admitting facility should be undertaken only when lesser measures will be insufficient,” which ignores the fact that in this case,

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there were no sufficient, less restrictive measures available for Michael's continued treatment. In the context of statutory construction, our Supreme Court has long held that "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *See, e.g., Frye Reg'l Med. Cntr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999). In the present case, Chapter 122C makes clear our General Assembly's intent to provide "within available resources" mental health services that are "designed to meet the needs of clients in the least restrictive, therapeutically most appropriate setting *available*." N.C. Gen. Stat. § 122C-2 (emphasis added). Here, because there were no other placements available at the time of the 10 October 2013 hearing, the court was essentially faced with the option of either readmitting Michael to Thompson or else allowing a 12-year-old boy with a history of unmanaged sexual deviance problems and a newly discovered intellectual disability to be sent to a non-existent Level III placement or to an emergency placement that neither Sotile nor DSS believed would provide sufficient supervision and support for his needs. Under these circumstances, we conclude that the district court's decision to concur in Michael's readmission to Thompson was more in keeping with the legislative intent behind section 122C-224.3 than either of the aforementioned alternatives.

We also reject Michael's argument that the ultimate finding in the court's 22 October 2013 order was unsupported by adequate factual findings. On the one hand, each of the cases Michael cites in support of this argument addressed situations that are easily distinguishable from the present case. *See In re A.N.B.*, __ N.C. App. at __, 754 S.E.2d at 451 (reversing the trial court's order authorizing readmission of a minor to a PRTF because it failed to make a finding that the minor was "in need of further treatment" at the facility); *In re Allison*, 216 N.C. App. at 300, 715 S.E.2d at 915 (reversing the trial court because it failed to make any of the statutorily required findings); *In re Whatley*, __ N.C. App. __, __, 736 S.E.2d 527, 532 (2012) (reversing the trial court's involuntary commitment order because it failed to make any finding on the required element of dangerousness). Here, by contrast, the district court's order satisfied the requirements of section 122C-224.3 by indicating that it incorporated into its factual findings "all matters set out in [Sotile's court summary]," which it in turn relied on for its conclusions that Michael was mentally ill and in need of continued treatment at Thompson and that less restrictive measures would not be sufficient. On the other hand, Michael's argument that the court's findings of fact do not support its conclusions

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relies on selective quotations from the court's additional findings, most notably that Sotile did not believe Michael met the clinical conditions to remain in a PRTF. But this argument conveniently ignores the fact that in both her court summary and her testimony—which the court expressly incorporated into its findings of fact—Sotile strongly recommended that Michael remain at Thompson until an appropriate Level III post-discharge placement could be obtained. In light of the preceding analysis, we conclude that this evidence provided sufficient factual support for the court's conclusion concurring in Michael's readmission.

Finally, we address what appears to be the central thrust of Michael's complaint: namely, that his readmission to Thompson was less the result of his own condition than it was the product of a pattern of consistent failure and neglect by the adults charged with his care and custody to take the steps required to secure his transfer to a less restrictive facility. This Court does not take lightly the violation or deprivation of any juvenile's constitutionally protected liberty interest. We therefore strongly admonish DSS and Michael's legal guardian Autry for their lackluster performance here, and we also specifically caution DSS not to interpret our holding in this case as an excuse for future failures to take timely action in securing post-discharge placements. Nevertheless, this is not an action against DSS, and we are limited in this case to reviewing whether or not the district court erred based on the evidence that was before it during the 10 October 2013 hearing. Accordingly, we hold that the district court did not err in concurring in Michael's readmission to Thompson.

D. Michael was not prejudiced by DSS's participation in the 10 October 2013 hearing

[7] As explained *supra*, the issue of whether the trial court erred in its 23 May 2014 order by recognizing DSS as a *de facto* party to Michael's readmission hearing is not properly before us. But even if it were, we are not persuaded by Michael's argument that DSS's participation as a party during the 10 October 2013 hearing resulted in the admission of incompetent and prejudicial evidence against him.

Specifically, Michael claims that because he received no notice that DSS would offer testimony and evidence against him, he was unable to adequately prepare for the hearing. Michael takes particular exception to the fact that DSS's counsel was allowed to cross-examine Sotile about Dr. Hersh's report, which was never formally introduced into evidence and could not have been properly admitted without giving Michael the opportunity to confront and cross-examine Dr. Hersh. *See* N.C. Gen. Stat. § 122C-224.3(c).

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This argument fails for several reasons. First, Michael's assertion that he was essentially ambushed by a lack of notice that DSS would participate during the hearing in an adverse manner is undermined by the fact that Autry only appeared after Michael compelled her to by subpoena. Thus, regardless of Michael's motivation for subpoenaing Autry, his doing so essentially "opened the door" for adverse testimony from her. More importantly, it appears from our careful review of the record that Dr. Hersh's report and the other allegedly prejudicial evidence DSS attempted to introduce during the hearing were already before the court as a direct result of Sotile's court summaries and her testimony during the hearing.

In her court summary, Sotile noted the results of the psychosexual evaluation Dr. Hersh had performed as well as his recommendation that Michael be transferred to another Level IV PRTF and the conflict this created for post-discharge placement planning. Moreover, in her testimony during the 10 October 2013 hearing, Sotile had already answered questions from the court and from Michael's counsel about Dr. Hersh's evaluation before DSS's counsel ever cross-examined her about it. Under these circumstances, regardless of whether or not DSS had participated as a party during the hearing, it was inevitable that the court would consider Dr. Hersh's evaluation, which raised substantial questions concerning Michael's diagnosis and the propriety of his prior discharge plan that had not yet been addressed by the date of the hearing. Even though Sotile's recommendation was sufficient by itself to support the court's concurrence in Michael's readmission to Thompson, certainly this information was also highly relevant. Had Michael wanted to challenge Dr. Hersh's conclusions, he could have compelled Dr. Hersh to appear at the hearing as a witness, by subpoena if necessary, just as he did with Autry. In any event, we are wholly unpersuaded by the argument Michael now makes on appeal, especially given its implication that the district court would have reached a different result if only Michael's counsel had done a better job of concealing this highly relevant information. Therefore, we conclude that Michael suffered no prejudice as a result of DSS's participation during the 10 October 2013 hearing. Because the issue of whether or not the court erred by recognizing DSS as a *de facto* party in its 23 May 2014 order is unnecessary to this determination and was not properly preserved for our review, we decline to reach it.

AFFIRMED.

Judges DILLON and DIETZ concur.

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IVAN McLAUGHLIN AND TIMOTHY STANLEY, PLAINTIFFS

v.

DANIEL BAILEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS SHERIFF OF MECKLENBURG COUNTY,
AND OHIO CASUALTY INSURANCE COMPANY, DEFENDANTS

No. COA14-446

Filed 7 April 2015

1. Employer and Employee—statutory prohibition on termination for political reasons—not applicable to employees of sheriff

The trial court did not err by entering summary judgment in favor of defendant Sheriff of Mecklenburg County and his insurer in plaintiff employees' action for wrongful termination of employment. Plaintiffs' terminations did not violate N.C.G.S. § 153A-99 because plaintiffs, as employees of the sheriff, were not employees of the county.

2. Employer and Employee—deputy sheriff—policymaking position—termination for political reasons—freedom of speech

The trial court did not err by entering summary judgment in favor of defendant Sheriff of Mecklenburg County and his insurer on plaintiff employee's state constitutional claim based on wrongful termination of employment. Even assuming that the sheriff terminated plaintiff's employment for political reasons, the termination did not violate plaintiff's rights under the Constitution because, as a deputy sheriff, plaintiff occupied a policymaking position and therefore could be fired for political reasons.

3. Employer and Employee—detention officer—objective reasonableness of termination—no specific evidence of improper motivation

The trial court did not err by entering summary judgment in favor of defendant Sheriff of Mecklenburg County and his insurer on plaintiff employee's state constitutional claim based on wrongful termination of employment. The Court of Appeals did not need to determine whether plaintiff's termination was for political reasons because plaintiff failed to offer any evidence that he would not have been fired for violations of the rules and policies of the sheriff's department in carrying out his job duties.

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Appeal by plaintiffs from judgment entered 6 January 2014 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 November 2014.

Kennedy, Kennedy, Kennedy, and Kennedy, LLP, by Harold L. Kennedy, III, and Harvey L. Kennedy, for plaintiff-appellants.

Womble, Carlyle, Sandridge and Rice, LLP, by Sean F. Perrin, for defendant-appellee.

Edmond W. Caldwell, Jr., for amicus curiae North Carolina Sheriffs' Association.

STEELMAN, Judge.

The employees of a county sheriff, including deputies and others hired by the sheriff, are directly employed by the sheriff and not by the county or by a county department. Sheriff's employees are not "county employees" as defined in N.C. Gen. Stat. § 153A-99 and are not entitled to the protections of that statute. As a sworn deputy sheriff, plaintiff Stanley could be discharged based upon political conduct without violating free speech rights under the North Carolina Constitution. Where defendant produced evidence that plaintiff McLaughlin was discharged for failure to comply with sheriff's department rules and policies, and McLaughlin failed to produce specific evidence that his discharge was politically motivated, the trial court properly dismissed his claim for violation of his rights to free speech under the North Carolina Constitution.

I. Factual and Procedural Background

Ivan McLaughlin and Timothy Stanley (plaintiffs) were employed by former Mecklenburg County Sheriff Daniel Bailey (defendant, with Ohio Casualty Insurance Company, collectively, defendants). Stanley was hired in 1998 as a detention officer at the Mecklenburg County jail, and as a deputy sheriff in 2008. He worked primarily as a courtroom bailiff. McLaughlin was hired as a juvenile counselor at the Gatling Juvenile Detention Center in 1998, and was not a sworn law enforcement officer. When the Mecklenburg County Sheriff's Department assumed responsibility for Gatling, McLaughlin became a detention counselor for youthful offenders housed in Mecklenburg County's Jail North.

In June 2009 defendant, a registered Democrat, sent a letter to approximately 1,350 of his employees, announcing his candidacy for reelection and stating that he would appreciate campaign contributions.

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Plaintiffs, who were Republicans, did not contribute to defendant's reelection campaign or attend a fund-raising barbeque sponsored by the campaign. Defendant was reelected in November 2010.

Stanley received favorable performance reviews between 2007 and 2010. However, shortly before the election, Stanley's supervisor reported to defendant that Stanley had been disruptive during the morning briefings by talking in the back of the room and making remarks expressing a preference for defendant's opponent in the election. On 30 November 2011 Stanley was terminated from his employment as a deputy sheriff. Defendant testified in his deposition that Stanley was terminated for being disruptive.

McLaughlin also received favorable performance reviews for several years prior to the election. However, in August 2010 the staff at Jail North, including McLaughlin, received a memo emphasizing the importance of "pod tours" to verify that inmates were present and were not in distress, and warning that failure to conduct pod tours would result in termination. McLaughlin's supervisor testified in his deposition that the "purpose of a pod tour . . . is to make sure that a pod officer can account for every inmate . . . being alive[.]" On 19 November 2010 McLaughlin's supervisors visited Jail North and observed a number of violations of the rules for supervision of the youthful offender population, including failure to conduct pod tours. The supervisors also reviewed a videotape that showed McLaughlin committing additional violations of Sheriff's Department rules. The supervisors documented McLaughlin's violations and submitted a report to the Office of Professional Compliance, which interviewed McLaughlin on 30 November 2010. During the interview, McLaughlin conceded that he had failed to follow Sheriff's Department rules on a number of occasions. On 10 January 2011 McLaughlin received a memorandum setting forth his violations of the Sheriff's Department rules, and the resultant decision to terminate his employment. McLaughlin's termination was confirmed by the Sheriff's Department review board.

On 17 January 2012 plaintiffs filed a complaint, asserting claims against defendants for wrongful termination of employment in violation of public policy, and for violation of their rights under the Constitution of North Carolina, Article 1, § § 14 and 36. Plaintiffs asserted that they were terminated "for failing to make contributions to [Sheriff] Bailey's reelection campaign and for failing to volunteer to work in his campaign," and that McLaughlin was terminated based on "his Republican beliefs." Plaintiffs asserted that their termination was "in violation of [the] public policy" enunciated in N.C. Gen. Stat. § 153A-99. Defendants filed separate

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answers denying the material allegations of plaintiffs' complaint. On 13 June 2013 defendants filed a joint motion for summary judgment on all claims. On 6 January 2014 the trial court entered summary judgment in favor of defendants and dismissed plaintiffs' complaint.

Plaintiffs appealed. Although plaintiffs' complaint asserted claims against defendant in both his individual and official capacities, plaintiffs only appeal the entry of summary judgment on their claims against defendant in his official capacity.

II. Standard of Review

Under N.C. Gen. Stat. § 1A-1, Rule 56(a), summary judgment is properly entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." "In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) [(2013)], and must be viewed in a light most favorable to the non-moving party.'" *Patmore v. Town of Chapel Hill N.C.*, __ N.C. App. __, __, 757 S.E.2d 302, 304 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (internal citation omitted)), *disc. review denied*, __ N.C. __, 758 S.E.2d 874 (2014).

In a trial court's ruling on a motion for summary judgment, "[a] verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.' On the other hand, 'the trial court may not consider an unverified pleading when ruling on a motion for summary judgment.' Plaintiff[s]' complaint in this case was not verified, so it could not be considered in the course of the trial court's deliberations concerning Defendants' summary judgment motion." *Rankin v. Food Lion*, 210 N.C. App. 213, 220, 706 S.E.2d 310, 315-16 (2011) (quoting *Merrett, Flebotte, Wilson, Webb & Caruso, PLLC v. Hemmings*, 196 N.C. App. 600, 605, 676 S.E.2d 79, 83-84 (2009) (internal quotation omitted), and *Tew v. Brown*, 135 N.C. App. 763, 767, 522 S.E.2d 127, 130 (1999)).

III. Termination in Violation of Public Policy

[1] In plaintiffs' first argument, they contend that they were wrongfully terminated in violation of the public policy articulated in N.C. Gen. Stat. § 153A-99. Plaintiffs assert that they were "county employees" as defined in § 153A-99, and that their termination from employment violated this statute. We disagree.

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A. Legal Principles

“In North Carolina, ‘in the absence of an employment contract for a definite period, both employer and employee are generally free to terminate their association at any time and without any reason.’” *Elliott v. Enka-Candler Fire & Rescue Dep’t, Inc.*, 213 N.C. App. 160, 163, 713 S.E.2d 132, 135 (2011) (quoting *Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 655, 412 S.E.2d 97, 99 (1991)). “However, the employee-at-will rule is subject to certain exceptions. . . . ‘[W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy.’” *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 446-47 (1989) (quoting *Sides v. Duke University*, 74 N.C. App. 331, 342, 328 S.E. 2d 818, 826 (1985), *overruled in part on other grounds as stated in Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 493 S.E.2d 420 (1997)).

Plaintiffs argue that they were terminated in violation of the public policy set forth in N.C. Gen. Stat. § 153A-99:

(a) The purpose of this section is to ensure that county employees are not subjected to political or partisan coercion while performing their job duties, [and] to ensure that employees are not restricted from political activities while off duty[.] . . . Employees shall not be restricted from affiliating with civic organizations of a partisan or political nature, nor shall employees, while off duty, be restricted from attending political meetings, or advocating and supporting the principles or policies of civic or political organizations, or supporting partisan or nonpartisan candidates of their choice in accordance with the Constitution and laws of the State and the Constitution and laws of the United States of America.

(b) Definitions. For the purposes of this section: (1) “County employee” or “employee” means any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds[.] . . .

“The express purpose of N.C. Gen. Stat. § 153A-99 is ‘to ensure that county employees are not subjected to political or partisan coercion while performing their job duties[.]’ N.C. Gen. Stat. § 153A-99 (2002).

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In *Vereen v. Holden*, this Court noted that if a county employee was fired due to his political affiliations and activities, ‘this would contravene rights guaranteed by our State Constitution. . . . and the prohibition against political coercion in county employment stated in N.C. Gen. Stat. § 153A-99,’ hence violating North Carolina public policy.” *Venable v. Vernon*, 162 N.C. App. 702, 705-06, 592 S.E.2d 256, 258 (2004) (quoting *Vereen v. Holden*, 121 N.C. App. 779, 784, 468 S.E.2d 471, 474 (1996) (internal citations omitted)).

B. Analysis

The threshold question is whether plaintiffs were county employees. N.C. Gen. Stat. § 153A-99 defines a county employee as an individual who is “employed by a county or any department or program thereof that is supported, in whole or in part, by county funds[.]” It is undisputed that a county sheriff’s department is “supported, in whole or in part, by county funds” and that a county’s administrators interact in various ways with the sheriff’s department. The crucial question, however, is whether or not the persons hired by a sheriff are “employed by” a county department, in this case the “sheriff’s department.” We conclude that the plaintiffs are employees of the defendant sheriff individually, and are not employed by the county.

Preliminarily, we note that our common law unequivocally establishes that sheriff’s deputies are employees of the sheriff, and are not county employees. In *Styers v. Forsyth County*, 212 N.C. 558, 194 S.E. 305, (1937), the widow of a deceased deputy sheriff was denied workers compensation benefits based on the trial court’s determination that the deputy was an employee of the sheriff rather than of the county. On appeal, our Supreme Court held that a statute allowing Forsyth County to provide a fixed salary for certain deputies was not applicable to the facts of the case, given that the deceased deputy had been hired directly by the sheriff. The Court also discussed the legal relationship between the sheriff and his deputies:

“The deputy is not the agent or servant of the sheriff but is his representative, and the sheriff is liable for his acts as if they had been done by himself.” . . . The acts of the deputy are acts of the sheriff. For this reason the sheriff is held liable on his official bond for acts of his deputy. “A sheriff is liable for the acts or omissions of his deputy as he is for his own.” In short, a deputy is a lieutenant, the sheriff’s right-hand man, whose duties are coequal in importance with those of his chief. One who represents

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the high sheriff of the county in the capacity of deputy occupies no mean place. . . . He holds an appointment as distinguished from an employment.

Styers at 563, 563-64, 194 S.E. at 308-309 (quoting *Michel v. Smith*, 188 Cal. 199, 202, 205 P. 113, 114 (1922), citing *Horne v. Allen*, 27 N.C. 36 (1844), and *Spencer v. Moore*, 19 N.C. 264 (1837), and quoting *Sutton v. Williams*, 199 N.C. 546, 548, 155 S.E. 160, 162 (1930) (other citations omitted).

The holding of *Styers*, that a deputy is an employee of the sheriff and acts as his “alter ego,” has been followed in subsequent cases. In *Clark v. Burke County*, 117 N.C. App. 85, 89, 450 S.E.2d 747, 749 (1994), we held that Burke County was not liable for the alleged negligence of a sheriff’s deputy:

A deputy is an employee of the sheriff, not the county. Therefore, any injury resulting from Deputy Smith’s actions in this case cannot result in liability for Burke County and summary judgment is therefore affirmed for Burke County.

(citation omitted). Similarly, in *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 368 S.E.2d 892 (1988), we rejected the argument by the plaintiff, a dispatcher for the sheriff’s department, that she was a county employee:

Plaintiff argues that even though she was hired by the sheriff, she remained the employee of Watauga County and thus all the protections and privileges provided by the Board of Commissioners to other county employees should have been afforded her[.] . . . We cannot agree. Plaintiff’s esoteric analysis of the issue is misplaced. It is clear to this Court that plaintiff was an employee of the sheriff and not Watauga County and its Board of Commissioners. . . . Furthermore, “under state law the sheriff has the exclusive right to fire any deputy [or employee] in his office.” . . . [P]laintiff was not an ‘employee’ of Watauga County or its Board of Commissioners[.]

Peele, 90 N.C. App. at 449-50, 368 S.E.2d at 893-94 (quoting *Joyner v. Lancaster*, 553 F. Supp. 809, 816 (M.D.N.C. 1982)). See also, e.g., *Greene v. Barrick*, 198 N.C. App. 647, 653, 680 S.E.2d 727, 731 (2009) (“Our law is well-settled. ‘A sheriff is liable for the acts or omissions of his deputy as he is for his own.’”) (quoting *Prior v. Pruett*, 143 N.C. App. 612, 621, 550 S.E.2d 166, 172 (2001) (internal quotation omitted)).

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The fact that the county is the source of funding to pay deputies does not change their status as employees of the sheriff. In *Hubbard v. Cty. of Cumberland*, 143 N.C. App. 149, 152, 544 S.E.2d 587, 589-90 (2001), this Court acknowledged that deputies are paid from county funds, but held that:

Plaintiffs in the instant case are law enforcement officers hired directly by the Sheriff of Cumberland County. The Sheriff is an independent constitutionally mandated officer, elected by the voters. N.C. Const. art. VII, § 2. Because it is the Sheriff, and not the County, who directly hires law enforcement officers, plaintiffs do not enjoy all of the protections of County employees.

(citing *Peele* at 450, 368 S.E.2d at 894, and N.C. Gen. Stat. § 153A-103). Although our common law uniformly holds that the sheriff's employees are not employed by the county, it does not articulate a general definition of a "county employee." Nor do the cases discussed above restrict their holdings by, for example, stating that a deputy is not a county employee "for purposes of *respondeat superior*."

Our common law is undergirded by certain statutory and constitutional provisions. N.C. Const. art. VII, § 2 states that "[i]n each county a Sheriff shall be elected by the qualified voters thereof at the same time and places as members of the General Assembly are elected and shall hold his office for a period of four years[.]" N.C. Gen. Stat. § 153A-103 provides that:

(1) Each sheriff and register of deeds elected by the people has the exclusive right to hire, discharge, and supervise the employees in his office. . . .

(2) Each sheriff and register of deeds elected by the people is entitled to at least two deputies who shall be reasonably compensated by the county[.] . . . Each deputy so appointed shall serve at the pleasure of the appointing officer. . . .

In sum:

"Under North Carolina law, sheriffs have substantial independence from county government." Under the North Carolina Constitution, voters directly elect the sheriff. See N.C. Const. art. VII, § 2. County governments do not hire sheriffs. By statute, "the sheriff, not the county

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encompassing his jurisdiction, has final policymaking authority over hiring, supervising, and discharging personnel in the sheriff's office."

Jones v. Sheriff, 2013 U.S. Dist. LEXIS 51032 *5 (E.D.N.C. 2013) (quoting *Parker v. Bladen Cnty.*, 583 F. Supp. 2d 736, 739 (E.D.N.C. 2008), and citing *Little v. Smith*, 114 F. Supp. 2d 437, 446 (W.D.N.C. 2000), and *Clark*, 117 N.C. App. at 89, 450 S.E.2d at 749 (other citation omitted)), *dismissed by Jones v. Harrison*, 2014 U.S. Dist. LEXIS 99537 (E.D.N.C. 2014).

In the instant case, plaintiff's claim for wrongful discharge in violation of public policy is based on their argument that the strictures of N.C. Gen. Stat. § 153A-99 protect them, as "county employees," from being terminated for political reasons. As noted above, this statute states that "'County employee' or 'employee' means any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds[.]" We conclude that this statute does not apply to plaintiffs, who are employed by the sheriff and are not county employees.

We first note that the statute's reference to "'county employee' or 'employee'" does not create two separate classes of employees, but simply clarifies that the statutory definition applies uniformly to all provisions of the statute, regardless of whether or not the word "employee" is modified by "county." There is no indication in the statute that the legislature intended to identify two separate classifications of employees. Secondly, we hold that employees of a county sheriff are not "employed by a county or any department or program thereof." Our common law as well as the relevant statutory and state constitutional provisions clearly establish that plaintiffs, who were hired by the sheriff, are employees of the sheriff, and are not employed by the county in which the sheriff is elected.

In reaching this conclusion, we have considered, but ultimately reject, plaintiffs' arguments for a contrary result. Plaintiffs do not cite any binding authority holding that persons hired by a sheriff are county employees. Instead, plaintiffs contend that the enactment of N.C. Gen. Stat. § 153A-99 effectively abrogated the common law, and that the statute's scope encompasses employees of a sheriff. In support of this argument, plaintiffs primarily rely on a 1998 advisory opinion of the North Carolina Attorney General, which opined that the statute was "applicable to elected officials of counties[.]" "[W]hile opinions of the Attorney General are entitled to 'respectful consideration,' such opinions are not

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compelling authority.” *Williams v. Alexander County Bd. of Educ.*, 128 N.C. App. 599, 602, 495 S.E.2d 406, 408 (1998) (quoting *Hannah v. Commissioners*, 176 N.C. 395, 396, 97 S.E. 160, 161 (1918)). In addition, we have considered the sources cited both in the Attorney General’s 1998 opinion and by plaintiffs, and are not persuaded that N.C. Gen. Stat. § 153A-99 established a new definition of a county employee in abrogation of the common law.

Plaintiffs, as well as the Attorney General’s opinion, cite *Carter v. Good*, 951 F. Supp. 1235 (W.D.N.C. 1996), *reversed and remanded*, 145 F.3d 1323 (4th Cir. N.C. 1998) (unpublished). The *Carter* opinion stated that:

Plaintiff alleges a cause of action for a violation of N.C. Gen. Stat. § 153A-99 which prohibits counties from restricting county employees in any manner concerning their political affiliation and activities. Defendants seek judgment on the grounds that sheriffs are not county employees. This argument has been previously rejected.

Carter, 951 F. Supp. at 1248-49. “Although we are not bound by federal case law, we may find their analysis and holdings persuasive.” *Ellison v. Alexander*, 207 N.C. App. 401, 405, 700 S.E.2d 102, 106 (2010) (quoting *Brown v. Centex Homes*, 171 N.C. App. 741, 744, 615 S.E.2d 86, 88 (2005)). However, *Carter* did not engage in any analysis of the issue, discuss authority pertaining to this issue, or even cite the basis for its assertion that the argument that the plaintiff was not a county employee under N.C. Gen. Stat. § 153A-99 had “been previously rejected.” Moreover, *Carter* was reversed, further limiting its persuasive authority.

Plaintiffs also cite *Elkin Tribune, Inc. v. Yadkin County Bd. of Commissioners*, 331 N.C. 735, 417 S.E.2d 465 (1992), and *Durham Herald Co. v. County of Durham*, 334 N.C. 677, 435 S.E.2d 317 (1993), cases that addressed the applicability of N.C. Gen. Stat. § 153A-98 to applicants for county manager and sheriff respectively. N.C. Gen. Stat. § 153A-98(a) provides in relevant part that “[n]otwithstanding the provisions of G.S. 132-6 or any other general law or local act concerning access to public records, personnel files of employees, former employees, or applicants for employment maintained by a county are subject to inspection and may be disclosed only as provided by this section.” The statute thus regulates disclosure of information contained in the “personnel files of employees, former employees, or applicants for employment maintained by a county[.]” In *Durham Herald*, the plaintiff argued

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that the applications for the position of sheriff¹ were not protected by the statute because the sheriff is not a county employee. We acknowledged this distinction, but held that:

While there are certainly differences between the office of sheriff and the position of county manager, which would be material in other contexts, the application of section 153A-98 does not turn on such distinctions. The clear purpose of this statute is to provide some confidentiality to those who apply to county boards or their agents for positions which those boards and their agents are authorized to fill. It is in this sense that the statute uses the terms “applicants for employment” and makes the personnel files of such applicants subject to its provisions. An “applicant” holds no position with the county whether as an “employee” in the strict sense of the term or as an elected public official such as the sheriff. He, or she, is merely an applicant for such positions. It is as applicants that the statute seeks to afford them and their applications some measure of confidentiality.

Durham Herald, 334 N.C. at 679, 435 S.E.2d at 319. *Durham Herald* did not hold that the sheriff or his deputies are county employees. In essence, the case held that even though the sheriff and the applicants for sheriff were not county employees, the applications for the position were protected from disclosure.

Plaintiffs also argue that a close scrutiny of the word “thereof” in § 153A-99 reveals that the statute classifies them as county employees. However, we are unable to conclude that our legislature would abrogate longstanding and consistent common law by such an indirect method as the use of the modifier “thereof.”

“In determining legislative intent, we may ‘assume [that] the legislature is aware of any judicial construction of a statute.’” *Blackmon v. N.C. Dep’t of Correction*, 343 N.C. 259, 265, 470 S.E.2d 8, 11 (1996) (quoting *Watson v. N.C. Real Estate Comm.*, 87 N.C. App. 637, 648, 362 S.E.2d 294, 301 (1987)). Therefore, we assume that when the legislature enacted N.C. Gen. Stat. § 153A-99, it was aware of the common law rule

1. Although the sheriff is an elected official, N.C. Gen. Stat. § 162-3 provides that a “sheriff may vacate his office by resigning the same to the board of county commissioners of his county; and thereupon the board may proceed to elect another sheriff.” In *Durham Herald*, the sheriff had resigned and the county commissioners solicited applications for his replacement.

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that sheriff's deputies are not county employees. In this regard, we find it significant that in a similar context our legislature amended a different statute to explicitly abrogate the common law rule. Earlier cases held that, as employees of the sheriff, deputies were not entitled to workers' compensation benefits. In response, in 1939, "the General Assembly amended [N.C. Gen. Stat. § 97-2] . . . so as (1) to include deputies sheriff and all persons acting in capacity of deputy sheriff within the meaning of the term 'employee' as used in the act[.]" *Towe v. Yancey County*, 224 N.C. 579, 580, 31 S.E.2d 754, 755 (1944). The amended statute provided in relevant part that:

§ 97-2(2) . . . The term 'employee' shall include deputy sheriffs and all persons acting in the capacity of deputy sheriffs, whether appointed by the sheriff or by the governing body of the county and whether serving on a fee basis or on a salary basis, or whether deputy sheriffs serving upon a full-time basis or a part-time basis[.] (emphasis added).

We believe that, had the legislature wished to abrogate the common law for purposes of N.C. Gen. Stat. § 153A-99, it would have been similarly direct, rather than requiring our appellate courts to engage in a strained analysis of the word "thereof" in order to ascertain their intent. "To determine whether N.C.G.S. § [153A-99] abrogated the [common law rule] at issue, we must examine its plain language." *Rosero v. Blake*, 357 N.C. 193, 206, 581 S.E.2d 41, 49 (2003) (citing *State v. Dellinger*, 343 N.C. 93, 95, 468 S.E.2d 218, 220 (1996)).

We also find it significant that other statutes addressing issues of county administration employ broader terms that would encompass a county sheriff and his or her employees. For example, N.C. Gen. Stat. § 153A-92(a) authorizes a county board of commissioners to "fix or approve the schedule of pay, expense allowances, and other compensation of all county officers and employees, whether elected or appointed, and may adopt position classification plans." (emphasis added). And, N.C. Gen. Stat. § 153A-435(a) authorizes a county to "contract to insure itself and any of its officers, agents, or employees against liability . . . caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment." (emphasis added). "It is a tenet of statutory construction that 'a change in phraseology when dealing with a subject raises a presumption of a change in meaning.' If the legislature had wanted to [include a sheriff's employees in N.C. Gen. Stat. § 153A-99] it could have expressly written § [153A-99] to include [persons

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employed by an agent or officer of a county.] . . . The fact that the legislature had the option to include this language, but chose not to, is presumptive evidence that it intended that the provision not encompass such options.” *Brown v. Brown*, 112 N.C. App. 15, 20, 434 S.E.2d 873, 878 (1993) (quoting *Latham v. Latham*, 178 N.C. 12, 100 S.E. 131 (1919)).

Moreover, the interpretation of N.C. Gen. Stat. § 153A-99 was recently addressed by this Court in *Sims-Campbell v. Welch*, __ N.C. App. __, __, __ S.E.2d __, __ (3 March 2015). In *Sims-Campbell*, the plaintiff, an assistant register of deeds, argued that her firing violated N.C. Gen. Stat. § 153A-99:

Sims-Campbell also argues that [her firing] . . . violated Section 153A-99 of the General Statutes[.] . . . This argument fails because an assistant register of deeds is not a county employee. . . . We again find guidance in our cases dealing with the office of sheriff. In a series of cases, this court has held that sheriff’s deputies . . . are not county employees, but rather employees of the sheriff. . . . In light of the statute’s plain language and our analogous case law concerning deputy sheriffs, we conclude that an assistant register of deeds . . . is not a “county employee” within the meaning of N.C. Gen. Stat. § 153A-99(b)(1).

Sims-Campbell, __ N.C. App. at __, __ S.E.2d at __. “Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

We are not unsympathetic to the plaintiffs’ circumstances. However, “this Court is not in the position to expand the law. Rather, such considerations must be presented to our Supreme Court or our Legislature, who have the power to rectify any inequities[.] . . . This Court is an error-correcting court, not a law-making court.” *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 127, 723 S.E.2d 352, 358 (2012). We hold that the trial court did not err in its adherence to the common law principle that those hired by a sheriff are not county employees, and that N.C. Gen. Stat. § 153A-99 did not articulate a new definition of “county employee.” As this statute was the basis of plaintiffs’ claim for wrongful termination in violation of public policy, this argument is without merit.

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IV. Violation of North Carolina Constitutional Rights

In their second argument, plaintiffs contend that their termination violated their rights to freedom of speech guaranteed by Art. 1, § 14 of the North Carolina Constitution. We disagree.

A. Legal Principles

“The First Amendment to the Federal Constitution provides: ‘Congress shall make no law . . . abridging the freedom of speech, or of the press[.]’ . . . Similarly, Article I, § 14 of the North Carolina Constitution states: ‘Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.’ N.C. Const. art. I, § 14.” *State v. Peterslie*, 334 N.C. 169, 183, 432 S.E.2d 832, 840 (1993). “[W]e have recognized a cause of action against state officials for [the] violation [of art. I, § 14]. . . . We have also recognized that ‘in construing provisions of the Constitution of North Carolina, this Court is not bound by opinions of the Supreme Court of the United States construing even identical provisions in the Constitution of the United States.’” *Peterslie*, 334 N.C. at 184, 432 S.E.2d at 841 (citing *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992) (other citations omitted)).

“To establish a cause of action for wrongful discharge or demotion in violation of his right to freedom of speech, plaintiff must forecast sufficient evidence ‘that the speech complained of qualified as protected speech or activity’ and ‘that such protected speech or activity was the ‘motivating’ or ‘but for’ cause for his discharge or demotion.’ ‘The resolution of these two critical issues is a matter of law and not of fact.’” *Swain v. Elftand*, 145 N.C. App. 383, 386-87, 550 S.E.2d 530, 533 (2001) (quoting *Warren v. New Hanover County Bd. of Education*, 104 N.C. App. 522, 525-26, 410 S.E.2d 232, 234 (1991) (internal quotation omitted), and citing *Evans v. Cowan*, 132 N.C. App. 1, 9, 510 S.E.2d 170, 175 (1999)). “[T]he causal nexus between protected activity and retaliatory discharge must be something more than speculation.” *Lenzer v. Flaherty*, 106 N.C. App. 496, 510, 418 S.E.2d 276, 284 (1992) (citing *Brooks v. Stroh Brewery Co.*, 95 N.C. App. 226, 237, 382 S.E.2d 874, 882 (1989)). In addition, in *Corum*, our Supreme Court “adopt[ed] the reasoning applied in the majority of federal circuit courts of appeal[.]” and held that:

“[W]here the defendant’s subjective intent is an element of the plaintiff’s claim and the defendant has moved for summary judgment based on a showing of the objective

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reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to *specific evidence* that the officials' actions were improperly motivated."

Corum, 330 N.C. at 774, 413 S.E.2d at 284-85 (quoting *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 649 (10th Cir. 1988) (emphasis in *Corum*)).

B. Stanley's State Constitutional Claim

[2] Plaintiffs' complaint alleges that Stanley was terminated "for refusing to make contributions to [defendant's] re-election campaign and for failing to volunteer to work in his campaign[,] in "violat[ion] of the Constitution of North Carolina, Article I, § 14 and 36." Assuming, without deciding, that Stanley produced evidence that he was terminated for expressing his political views, we hold that his termination did not violate his rights under the North Carolina Constitution.

"[T]he First Amendment generally bars the firing of public employees 'solely for the reason that they were not affiliated with a particular political party or candidate,' as such firings can impose restraints 'on freedoms of belief and association[.]'" *Bland v. Roberts*, 730 F.3d 368, 374 (4th Cir. 2013) (quoting *Knight v. Vernon*, 214 F.3d 544, 548 (4th Cir. 2000) (internal quotation marks omitted), and *Elrod v. Burns*, 427 U.S. 347, 355, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality opinion)). However, "the Supreme Court in *Elrod* created a narrow exception 'to give effect to the democratic process' by allowing patronage dismissals of those public employees occupying policymaking positions." *Id.* (quoting *Jenkins v. Medford*, 119 F.3d 1156, 1161 (4th Cir. 1997) (*en banc*)).

In *Jenkins* we analyzed the First Amendment claims of several North Carolina sheriff's deputies who alleged that the sheriff fired them for failing to support his election bid and for supporting other candidates. In so doing, we considered the political role of a sheriff, the specific duties performed by sheriff's deputies, and the relationship between a sheriff and his deputies as it affects the execution of the sheriff's policies. . . . [We] concluded "that in North Carolina, the office of deputy sheriff is that of a policymaker, and that deputy sheriffs are the alter ego of the sheriff generally[.]" . . . [and] determined "that such North Carolina deputy sheriffs may be lawfully terminated for political reasons under the *Elrod-Branti* exception to prohibited political terminations."

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Bland, 730 F.3d at 376 (quoting *Jenkins*, 119 F.3d at 1164). “In [*Jenkins*] the majority explained that it was the deputies’ role as sworn law enforcement officers that was dispositive[.]” *Bland* at 377.

The reasoning of *Jenkins* and *Bland* was adopted by this Court in *Carter v. Marion*, 183 N.C. App. 449, 645 S.E.2d 129 (2007), *review denied, appeal dismissed*, 362 N.C. 175, 658 S.E.2d 271 (2008). The plaintiffs in *Carter* were former deputy clerks of court who claimed that they had been terminated from their employment for political reasons, in violation of their rights to free speech under the North Carolina Constitution. On appeal, we discussed the holdings of the United States Supreme Court in *Elrod*, and in *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980), which held that public employees could be discharged “for not being supporters of the political party in power” if “party affiliation is an appropriate requirement for the position involved.” *Carter*, 183 N.C. App. at 453, 645 S.E.2d at 131. The *Carter* opinion also discussed the holding of *Jenkins* that “deputies actually sworn to engage in law enforcement activities on behalf of the sheriff” could be lawfully terminated for political reasons, and noted that *Jenkins* based its holding on the facts that:

[D]eputy sheriffs (1) implement the sheriff’s policies; (2) are likely part of the sheriff’s core group of advisors; (3) exercise significant discretion; (4) foster public confidence in law enforcement; (5) are expected to provide the sheriff with truthful and accurate information; and (6) are general agents of the sheriff, and the sheriff is civilly liable for the acts of his deputy.

Carter at 454, 654 S.E.2d at 131 (citing *Jenkins* at 1162-63). Utilizing the analysis of *Jenkins* and *Knight*, *Carter* held that “political affiliation is an appropriate requirement for deputy clerks of superior court.” *Id.* In sum:

Government employees generally are protected from termination because of their political viewpoints. But this Court and various federal appeals courts repeatedly have held that deputy sheriffs and deputy clerks of court may be fired for political reasons such as supporting their elected boss’s opponents during an election.

Sims-Campbell, __ N.C. App. at __, __ S.E.2d at __ (citing *Carter*, *Jenkins*, *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), and *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989)).

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In the instant case, it is undisputed that Stanley, as a deputy sheriff, was a sworn law enforcement officer. Plaintiffs argue that, to determine whether Stanley could be terminated for political reasons, we must analyze his customary duties as an individual to assess whether he enjoyed a “policymaking” position. However, the holdings in both *Jenkins* and *Carter* were based on the nature of the plaintiff’s position, rather than on an analysis of the degree to which the individual’s employer consulted him or her on policy matters. *Carter* is controlling on the issue of whether Stanley could lawfully be fired based on political considerations, and we hold that his termination did not violate his free speech rights under the North Carolina Constitution.

C. McLaughlin’s State Constitutional Claim

[3] Plaintiffs’ complaint alleges that McLaughlin was terminated “for refusing to make contributions to [defendant’s] re-election campaign and for failing to volunteer to work in his campaign[,]” and “because of his Republican beliefs.” Unlike Stanley, McLaughlin was not a sworn law enforcement officer. Given that *Carter* held that deputy clerks of court might lawfully be fired based on political considerations, this is not necessarily dispositive. However, defendants’ appellee brief takes the position that, “[a]s McLaughlin was a detention officer, his wrongful discharge claim does not fail as a matter of law.” In light of defendants’ concession on this issue, we assume, without deciding, that McLaughlin could not lawfully be terminated for his exercise of his right to free speech. We conclude, however, that even assuming, *arguendo*, that McLaughlin produced evidence to support his claim that his termination was based on his political preferences, he failed to offer evidence that he would not have been fired for violations of sheriff’s department rules, regardless of his political affiliation.

McLaughlin’s argument that he was fired in violation of his right to free speech is based on the following circumstances: (1) McLaughlin received favorable performance reviews for several years before he was terminated; (2) over a year before the election, McLaughlin received the letter sent to over 1000 sheriff’s department employees, in which defendant announced his candidacy and solicited donations; (3) McLaughlin was a supporter of defendant’s opponent and did not contribute to defendant’s campaign; and (4) McLaughlin was told by Sergeant Nesbitt prior to the election that he would be fired if defendant won reelection.²

2. In response to defendant’s challenge to our consideration of the statement by Sergeant Nesbitt as hearsay, McLaughlin argues that “[c]learly [defendant] cannot raise this for the first time on appeal.” We agree. *See Gilreath v. N.C. Dept. of Health & Human Servs.*,

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On the other hand, defendants note that McLaughlin admitted in his deposition that his belief that defendant knew he was a Republican was “speculation,” and that defendant testified that he did not know the identities of the contributors to his campaign and did not know what McLaughlin’s political affiliation was. We agree with defendants that McLaughlin produced little evidence that “protected activity was a substantial or motivating factor” in defendant’s decision to terminate him. However, we do not need to reach a definitive conclusion on this issue, given McLaughlin’s failure to produce evidence to rebut defendant’s showing that McLaughlin was fired for failure to comply with Sheriff’s Department rules and policies.

“[W]here the defendant’s subjective intent is an element of the plaintiff’s claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the officials’ actions were improperly motivated.’ Mere conclusory assertions of discriminatory intent embodied in affidavits or deposition testimony are not sufficient to avert summary judgment.” *Morrison-Tiffin v. Hampton*, 117 N.C. App. 494, 501 451 S.E.2d 650, 655-56 (1995) (quoting *Pueblo Neighborhood*, 847 F.2d at 649. We conclude that McLaughlin has failed to produce any evidence to rebut defendants’ substantial showing that he was fired for failure to comply with Sheriff’s Department rules.

Defendants’ Exhibit 2, a memorandum detailing the basis of McLaughlin’s termination, states that McLaughlin had been fired for unsatisfactory performance, described as follows:

- [1.] On November 19th and 20th [2009], D/O McLaughlin failed to follow policy and procedures while assigned to the youthful offender pod. Several things were observed by his supervisors and captured on [v]ideo while conducting their wellness checks.
- [2.] No crossover roll call conducted during feeding time.
- [3.] Youthful offender distributing food trays to the entire pod with no supervision.

177 N.C. App. 499, 629 S.E.2d 293, (2006) (on appeal from entry of summary judgment, plaintiff could not challenge the trial court’s refusal to strike paragraphs from an affidavit where she failed to obtain a ruling on the issue from the trial court).

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[4.] Video clips displayed D/O McLaughlin not conducting his pod tours, falsely entered Pod tours in OMS.

[5.] No shakedown were conducted.

[6.] Allowed a youthful offender to push his pod tour buttons as he remained at the podium.

[7.] Allowed youthful offenders to come out of their cells to watch TV when they should have been locked down.

[8.] No pre-pod inspection or orientation conducted [and] seen beating on the podium.

[9.] He is seen throwing the Pod Orientation paperwork on the floor, and pushes the youthful offender's white cards off the podium then allows one of them to retrieve them off the floor.

[10.] D/O McLaughlin had a discussion with his Sergeant on October 14th where policy and procedures were discussed.

[11.] On November 30th, during McLaughlin's interview with OPC he admitted to not following policy and procedures, allowing a youthful offender to feed the Pod, push his tour buttons, failing to conduct pod tours, shakedowns, and falsifying his log entries in OMS.

[12.] Detention Officer Ivan McLaughlin's actions were not in keeping with the highest standards of conduct as required by employees of the Mecklenburg County Sheriff's Office.

On appeal, McLaughlin asserts that some of these violations occurred during a 30 minute visit from his supervisors and that they "cornered" him so that he "would have to answer their questions," and then based his termination upon his failure to follow procedures during their visit. However, he does not dispute the factual accuracy of defendants' Exhibit 2, which specifies that violations occurred on both 19 and 20 November, that violations were observed on videotape, and that he admitted in his pre-termination interview that he had violated required rules and policies.³ In addition, McLaughlin admitted in his sworn

3. Plaintiffs argue on appeal that we should not consider the contents of McLaughlin's interview because it was "not certified" or transcribed by a court reporter, and because McLaughlin was not under oath during the interview. As discussed in regards

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deposition that he had violated Sheriff's Department rules, including falsifying a record. McLaughlin also admitted in his deposition that he had no information that Sheriff Bailey knew that he supported Bailey's opponent, and that his opinions on this issue were "speculation." As discussed above, where the "defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to *specific evidence* that the officials' actions were improperly motivated." *Corum* at 774, 413 S.E.2d at 284-85 (citation omitted). We hold that McLaughlin has failed to produce such evidence or to demonstrate that he would not have been fired "but for" his political beliefs.

V. Conclusion

For the reasons discussed above, we conclude that the trial court did not err by granting summary judgment in favor of defendants. Having reached this conclusion, we do not reach the parties' arguments on sovereign immunity. The trial court's order is

AFFIRMED.

Judge STEPHENS concurs.

Judge GEER concurs in part and dissents in part.

GEER Judge, concurring in part and dissenting in part.

I respectfully dissent in part from the majority opinion's conclusion that N.C. Gen. Stat. § 153A-99 (2013) does not cover employees of a county sheriff's office and, therefore, plaintiffs are not entitled to pursue a claim for wrongful discharge in violation of public policy based on that statute. I would hold that since the Mecklenburg County Sheriff's Office is funded by Mecklenburg County, both plaintiffs have properly asserted claims for wrongful discharge in violation of public policy based on N.C. Gen. Stat. § 153A-99. Because a wrongful discharge claim is an adequate alternative remedy, I would not address the state constitutional claim. I do, however, concur in the majority opinion's analysis of both plaintiffs' constitutional claims.

to Sergeant Nesbitt's statement, plaintiffs failed to challenge the interview at the trial level and cannot raise the issue for the first time on appeal. Moreover, plaintiff does not challenge defendants' Exhibit 2, which states that McLaughlin admitted to rules violations during his interview.

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With respect to the issue whether plaintiffs submitted sufficient evidence of wrongful discharge in violation of public policy, I would hold consistent with the majority opinion's analysis of plaintiff McLaughlin's constitutional claim, that McLaughlin has failed to present sufficient evidence to give rise to a genuine issue of material fact with respect to the wrongful discharge claim. The majority was not, however, required to address the sufficiency of plaintiff Stanley's evidence of political discrimination. I would hold that Stanley's evidence is sufficient to warrant reversal of the trial court's order granting summary judgment.

As the majority notes, the pivotal question is whether a sheriff's deputy is considered a "county employee" for purposes of N.C. Gen. Stat. § 153A-99. N.C. Gen. Stat. § 153A-99(b)(1) specifically defines "county employee" and "employee" for purposes of the statute: "'County employee' or 'employee' means any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds[.]" The majority opinion, in construing the phrase "county employee" in accordance with the common law, overlooks established principles of statutory construction.

As our Supreme Court has explained:

Where, however, the statute, itself, contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be. The courts must construe the statute as if that definition had been used in lieu of the word in question. If the words of the definition, itself, are ambiguous, they must be construed pursuant to the general rules of statutory construction

In re Clayton-Marcus Co., 286 N.C. 215, 219-20, 210 S.E.2d 199, 203 (1974) (internal citation omitted). *See also Institutional Food House, Inc. v. Coble*, 289 N.C. 123, 135-36, 221 S.E.2d 297, 305 (1976) (accord).

In accordance with statutory construction principles, this Court has previously refused to incorporate common law definitions when the statute itself contains a definition. *See, e.g., Campos-Brizuela v. Rocha Masonry, L.L.C.*, 216 N.C. App. 208, 219-20, 716 S.E.2d 427, 436 (2011) ("[W]e conclude that the broad statutory definition of 'employee' contained in N.C. Gen. Stat. § 97-2(2) renders it unnecessary for us to finely parse the common law distinctions between disclosed, unidentified, and undisclosed principals as applied to this case."); *Baker v. Rushing*, 104 N.C. App. 240, 248, 409 S.E.2d 108, 113 (1991) ("This broad, statutory

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definition of landlord makes irrelevant in determining the liability of an agent the common law distinction between disclosed and undisclosed principals.”).

Here, N.C. Gen. Stat. § 153A-99(b)(1) contains a specific definition of “county employee” and “employee.” Under controlling Supreme Court authority, the role of this Court is to apply the General Assembly’s actual definition. In the event that definition is deemed ambiguous, this Court is required to apply statutory construction principles in determining the General Assembly’s intent in adopting that definition. I have found no authority supporting the majority’s approach of essentially assuming that the General Assembly, although including a specific definition, actually intended simply to adopt the common law definition.

Indeed, the majority’s incorporation of the common law definition overlooks an obvious question: Why would the General Assembly need to include a definition of “county employee” if it intended that phrase to refer only to county employees as defined by the common law or employees undisputedly employed by the county under current law? In construing statutes, “we presume that the legislature acted with full knowledge of prior and existing law and its construction by the courts.” *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763 (1992). Consequently, in the absence of a specific statutory definition of “county employee,” we would have construed that phrase in accordance with prior opinions of our courts. Yet, here, because there is a statutory definition, the question before this Court is not whether sheriff’s department employees are “county employees” under prior case law, but rather what did the General Assembly intend when it enacted N.C. Gen. Stat. § 153A-99(b)(1)?

N.C. Gen. Stat. § 153A-99(b)(1) defines a “county employee” as an individual either (1) “employed by a county” or (2) employed by “any department or program thereof that is supported, in whole or in part, by county funds.” The majority opinion does not seriously address what the General Assembly intended when it referred to employees of “any department or program thereof that is supported, in whole or in part, by county funds.” *Id.*

As North Carolina’s constitution establishes, a sheriff’s department is a county sheriff’s department. *See* N.C. Const. art. VII, § 2 (“In each county a Sheriff shall be elected by the qualified voters thereof . . .”). Because a county sheriff’s department is also funded in whole or in part by county funds, it arguably is a department of the county supported by county funds. *See* N.C. Gen. Stat. § 153A-149(c)(18) (2013)

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(authorizing property taxes levied by counties to be used to “provide for the operation of the office of the sheriff of the county”); N.C. Gen. Stat. § 153A-103(2) (2013) (providing that “at least two deputies . . . shall be reasonably compensated by the county”). Thus, N.C. Gen. Stat. § 153A-99(b)(1) can reasonably be construed as encompassing employees of a sheriff’s department.

“Statutory language is ambiguous if it is fairly susceptible of two or more meanings.” *Purcell v. Friday Staffing*, ___ N.C. App. ___, ___, 761 S.E.2d 694, 698 (2014) (internal quotation marks omitted). When, as here, “‘a statute is ambiguous, judicial construction *must* be used to ascertain the legislative will.’” *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (emphasis added) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990)). Therefore, in deciding what the General Assembly in fact intended when it included within the definition of “county employee” employees of “any department or program thereof that is supported, in whole or in part, by county funds,” N.C. Gen. Stat. § 153A-99(b)(1), the majority should have applied statutory construction principles rather than just invoking the common law and holding that the statutory definition is synonymous with the common law at least with respect to sheriff’s department employees.

In my view, the majority opinion fails to give any separate meaning to the clause “any department or program thereof that is supported, in whole or in part, by county funds.” *Id.* Yet, it is a basic principle of statutory construction that

“[i]f possible, a statute must be interpreted so as to give meaning to all its provisions.” *State v. Buckner*, 351 N.C. 401, 408, 527 S.E.2d 307, 311 (2000) (citing *State v. Bates*, 348 N.C. 29, 35, 497 S.E.2d 276, 279 (1998)). “ ‘[S]ignificance and effect should, if possible, . . . be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word.’ ” *Hall v. Simmons*, 329 N.C. 779, 784, 407 S.E.2d 816, 818 (1991) (quoting *State v. Williams*, 286 N.C. 422, 432, 212 S.E.2d 113, 120 (1975)).

Brown v. N.C. Dep’t of Env’t & Natural Res., 212 N.C. App. 337, 346-47, 714 S.E.2d 154, 161 (2011). See also *In re K.L.*, 196 N.C. App. 272, 280, 674 S.E.2d 789, 794 (2009) (“It is, however, well established that [w]hen interpreting a statutory provision, [t]he legislature is presumed to have intended a purpose for each sentence and word in a particular statute, and a statute is not to be construed in a way which makes any portion of it ineffective or redundant.” (internal quotation marks omitted)).

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In other words, because N.C. Gen. Stat. § 153A-99(b)(1) refers to both individuals “employed by a county” and individuals employed by “any department or program thereof that is supported, in whole or in part, by county funds,” the General Assembly must have intended that the second clause cover people who do not otherwise fall within the clause “employed by a county.” If the statute is construed, as the majority opinion does, to cover only individuals actually “employed by a county,” *id.*, then the second clause is rendered meaningless – a construction that is impermissible.

The question becomes: what departments or programs exist that are in some fashion part of the county and are supported at least partially by county funds, but whose employees are not otherwise considered as being employed by the county? I believe that Chapter 153A itself answers that question. Article 5 of Chapter 153A covers the “Administration” of Counties. N.C. Gen. Stat. § 153A-99 appears in Part 4 (entitled “Personnel”) of Article 5. Part 5 of Article 5 addresses “Board of Commissioners and *Other Officers, Boards, Departments, and Agencies of the County.*” (Emphasis added.) The titles of Part 4 and Part 5 were included in the original session law enacting Chapter 153A. *See* 1973 N.C. Sess. Laws ch. 822, pp. 1246, 1248. These titles, therefore, are evidence of the General Assembly’s intent. *See State v. Fowler*, 197 N.C. App. 1, 6, 676 S.E.2d 523, 532 (2009) (“[W]hile ‘the caption [of a statute] will not be permitted to control when the meaning of the text is clear,’ ‘[w]here the meaning of a statute is doubtful, its title may be called in aid of construction.’” (quoting *Dunn v. Dunn*, 199 N.C. 535, 536, 155 S.E. 165, 166 (1930))).

Within Part 5 appears N.C. Gen. Stat. § 153A-103, which was also included in the 1973 Session Law and is titled: “Number of employees in offices of sheriff and register of deeds.” The statute specifies that the Board of County Commissioners may fix the number of salaried employees in the offices of the sheriff and the register of deeds subject to certain limitations. *Id.* Since Part 5 addresses not only the Board of County Commissioners, but also “Other Officers, Boards, Departments, and Agencies of the County,” I believe that § 153A-103 indicates the General Assembly’s intent that sheriff’s departments be considered, for purposes of Chapter 153A, as “Other . . . Departments[] and Agencies of the County.”

Moreover, while N.C. Gen. Stat. § 153A-103(1) specifies that the sheriff has “the exclusive right to hire, discharge, and supervise the employees in his office,” the statute also specifies that the county fixes the number of sheriff’s department salaried employees and pays

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their compensation. Given that the General Assembly has, in N.C. Gen. Stat. § 153A-99(b)(1), chosen to define a “county employee” in terms of who pays for the employee’s department or program – rather than who hires, fires, or supervises the employee – I believe, contrary to the majority opinion, that N.C. Gen. Stat. § 153A-103 in fact supports the conclusion that the General Assembly intended that sheriff’s departments fall within the scope of N.C. Gen. Stat. § 153A-99(b)(1). For that reason, I also find cases relied upon by the majority – deciding whether a sheriff’s department employee is a county employee for purposes of respondeat superior – unhelpful in addressing the General Assembly’s intent in N.C. Gen. Stat. § 153A-99. Those cases focus entirely on identifying who has the authority to control the actions of the deputy sheriffs – a different test than the one specified in N.C. Gen. Stat. § 153A-99(b)(1).

Moreover, the view that a sheriff’s department is an office or department of the county is, contrary to the majority opinion’s assumption, consistent with well-established and controlling law of the Supreme Court. In *Southern Ry. Co. v. Mecklenburg Cnty.*, 231 N.C. 148, 151, 56 S.E.2d 438, 440 (1949), the Supreme Court explained:

One of the primary duties of the county, acting through its public officers, is to secure the public safety by enforcing the law, maintaining order, preventing crime, apprehending criminals, and protecting its citizens in their person and property. This is an indispensable function of county government which the county officials have no right to disregard and no authority to abandon.

The sheriff is the chief law enforcement officer of the county.

(Emphasis added.) This portion of *Southern Railway* has more recently been relied upon by the Supreme Court in emphasizing the importance of county lines for redistricting purposes. *Stephenson v. Bartlett*, 355 N.C. 354, 365, 562 S.E.2d 377, 386 (2002). This Court has also held that this holding of *Southern Railway* is controlling authority. See *Boyd v. Robeson Cnty.*, 169 N.C. App. 460, 477, 621 S.E.2d 1, 12 (2005) (holding that “[w]e are bound by *Southern Railway*” when concluding that office of North Carolina sheriff is a “person” under § 1983).

When N.C. Gen. Stat. § 153A-99(b)(1) (emphasis added) refers to a “department or program *thereof* that is supported, in whole or in part, by county funds,” I can conceive of no other interpretation of “thereof” than “of the county.” Further, our legislature has chosen in Chapter 153A

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to require that the county fully fund the county sheriff's department, which is the county's means, consistent with its duties under *Southern Railway*, to provide for the public safety of its citizens. Under Chapter 153A and controlling Supreme Court authority, a sheriff is an officer *of the county*, his department is a department *of the county*, and, I would hold, it is encompassed within N.C. Gen. Stat. § 153A-99(b)(1).

A review of other statutes addressing the office of the sheriff further indicates that, as a matter of legislation, the General Assembly has chosen to give counties significant control over the office of the sheriff even though the sheriff remains a constitutionally-established, separate local government officer. The Fourth Circuit Court of Appeals has succinctly explained:

[The defendant sheriff] ignores, however, a series of indicia suggesting substantial county control of sheriffs. Residents of a county elect their sheriff. N.C. Const. art. VII, § 2; N.C. Gen. Stat. § 162-1. The Board of County Commissioners determines the number of salaried employees in the sheriff's office. § 153A-103. The county sets and pays the salaries of a sheriff and his deputies and the county determines and pays the overall budget. §§ 153A-103, 153A-149. If a vacancy arises in the position of sheriff, either by resignation or removal, the Board of County Commissioners appoints a new sheriff for the remainder of the sheriff's term. § 162-5. A petition for removal of a sheriff is prosecuted by the county attorney, § 128-17, before a judge of the Superior Court in the county where the sheriff resides. § 128-16. If a sheriff resigns, he forwards his resignation to the county commissioners. § 162-3. Sheriffs must also furnish a bond to the county commissioners, with the amount of the bond set by the commissioners. § 162-8.

Therefore, county government controls many significant aspects of North Carolina sheriffs' employment. County residents hire the sheriff (through election), the county government sets their pay, the county provides for the number of deputies, and the county attorney is the official with the power to move to dismiss the sheriff.

Harter v. Vernon, 101 F.3d 334, 340-41 (4th Cir. 1996) (internal footnote omitted). *See also id.* at 341 ("Sheriffs have been considered county officers from the creation of that office in England.").

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Moreover, the majority opinion's analysis cannot be reconciled with the " 'fundamental rule of statutory construction that statutes in *pari materia*, and all parts thereof, should be construed together and compared with each other.' " *Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009) (quoting *Redevelopment Comm'n v. Sec. Nat'l Bank*, 252 N.C. 595, 610, 114 S.E.2d 688, 698 (1960)). "Statutory provisions must be read in context: Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole. Statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each." *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003) (internal citation and quotation marks omitted). Further, " '[i]nterpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible.' " *Barnes v. Erie Ins. Exch.*, 156 N.C. App. 270, 278, 576 S.E.2d 681, 686 (2003) (quoting *Velez v. Dick Keffer Pontiac-GMC Truck, Inc.*, 144 N.C. App. 589, 593, 551 S.E.2d 873, 876 (2001)).

The majority opinion's holding means that no portion of N.C. Gen. Stat. § 153A-99 applies to employees of sheriff's departments. However, N.C. Gen. Stat. § 153A-99(e) provides that "[n]o employee may use county funds, supplies, or equipment for partisan purposes, or for political purposes except where such political uses are otherwise permitted by law." Consequently, the majority opinion leads to the result that this provision does not apply to sheriffs and their employees even though the sheriff's department's funding, supplies, and equipment come from the county.

Perhaps even more significantly, the majority's holding also places N.C. Gen. Stat. § 153A-99 in conflict with other provisions of Chapter 153A in which "county employee" and "employee" have been determined to include employees of the sheriff's department. N.C. Gen. Stat. § 153A-92(a) (2013) specifies that "the board of commissioners shall fix or approve the schedule of pay, expense allowances, and other compensation of *all county officers and employees, whether elected or appointed*, and may adopt position classification plans." (Emphasis added.) N.C. Gen. Stat. § 153A-92(d) authorizes a county to "purchase life insurance or health insurance or both for the benefit of all or any class of county officers and employees as a part of their compensation. A county may provide other fringe benefits for county officers and employees." These provisions – although addressing "county officers and employees"

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-- cover employees of the sheriff's department. *See Hubbard v. Cnty. of Cumberland*, 143 N.C. App. 149, 154, 544 S.E.2d 587, 591 (2001) (upholding denial of county's motion for summary judgment). Indeed, in *Hubbard*, this Court upheld the trial court's dismissal of the plaintiff's compensation-based claims against the sheriff on the grounds that it is not the sheriff's responsibility to fund the sheriff's department but that of the county, and "[n]or does the Sheriff administer the funds." *Id.*

Further, N.C. Gen. Stat. § 153A-97 (2013) provides that "[a] county may, pursuant to G.S. 160A-167, provide for the defense of: (1) Any county officer or employee, including the county board of elections or any county election official." N.C. Gen. Stat. § 160A-167(a) (2013) provides that the defense may be provided "by purchasing insurance which requires that the insurer provide the defense."

N.C. Gen. Stat. § 153A-435(a) (2013) also specifies:

A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment. The board of commissioners shall determine what liabilities and what officers, agents, and employees shall be covered by any insurance purchased pursuant to this subsection.

Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function. . . .

By entering into an insurance contract with the county, an insurer waives any defense based upon the governmental immunity of the county.

(Emphasis added.)

It is well established that sheriffs and their employees fall within these provisions:

Our Legislature has prescribed two ways for a sheriff to be sued in his official capacity, thus waiving sovereign immunity. First, under section 58-76-5, a plaintiff may sue

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a sheriff and the surety on his official bond for acts of negligence in the performance of official duties. . . .

Second, a sheriff may be sued in his official capacity under section 153A-435. Section 153A-435 permits a county to purchase liability insurance, which includes participating in a local government risk pool, for negligence caused by an act or omission of the county or any of its officers, agents, or employees when performing government functions. The [p]urchase of insurance under this subsection waives the county's sovereign immunity, to the extent of insurance coverage

Myers v. Bryant, 188 N.C. App. 585, 588, 655 S.E.2d 882, 885 (2008) (internal citations and quotation marks omitted).

In *Cunningham v. Riley*, 169 N.C. App. 600, 602, 611 S.E.2d 423, 424 (2005), this Court further recognized that when the county "purchased insurance covering the acts of the employees of the Mecklenburg County Sheriff's Department[.]" then "[a] suit against a sheriff's deputy in his official capacity constituted a suit against the county, thus triggering this insurance coverage." Moreover, while "[t]he doctrine of sovereign immunity generally bars recovery in actions against deputy sheriffs sued in their official capacity[.]" "[a] county may waive sovereign immunity by purchasing liability insurance, but only to the extent of coverage provided." *Id.* (citing N.C. Gen. Stat. § 153A-435(a) (2004)).

Finally, N.C. Gen. Stat. § 153A-98 (2013), which addresses the application of the Public Records Act to personnel files of county employees and applicants for county employment has also been held to apply to sheriffs and their employees. Our Supreme Court has held: "While there are certainly differences between the office of sheriff and the position of county manager, which would be material in other contexts, the application of section 153A-98 does not turn on such distinctions. The clear purpose of this statute is to provide some confidentiality to those who apply to county boards or their agents for positions which those boards and their agents are authorized to fill. It is in this sense that the statute uses the terms 'applicants for employment' and makes the personnel files of such applicants subject to its provisions." *Durham Herald Co. v. Cnty. of Durham*, 334 N.C. 677, 679, 435 S.E.2d 317, 319 (1993).

In short, without a specific definition such as that contained in N.C. Gen. Stat. § 153A-99(b)(1) – a definition that by its terms encompasses a sheriff's department – other provisions of Chapter 153A, including

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provisions within the same Article and Part as N.C. Gen. Stat. § 153A-99, have been deemed to cover employees of a sheriff's department even though referencing only "county officers" or "county employees." The majority opinion provides no rationale for concluding that the General Assembly intended in these provisions to include sheriffs as county officers and to bring sheriff's department employees within the scope of those provisions, but had a different intent in N.C. Gen. Stat. § 153A-99.

I can conceive of no basis for reaching that conclusion given the definition actually contained in N.C. Gen. Stat. § 153A-99(b)(1) and its focus on funding of departments as opposed to control over personnel decisions when defining "county employee." I would, therefore, hold under longstanding principles of statutory construction that employees of sheriff's departments fall within the definition of "county employee" and "employee" set out in N.C. Gen. Stat. § 153A-99(b)(1).

Based on this conclusion, I would further hold that plaintiff Stanley may assert a wrongful discharge claim in violation of the public policy set out in N.C. Gen. Stat. § 153A-99. *See Vereen v. Holden*, 121 N.C. App. 779, 784, 468 S.E.2d 471, 474 (1996) (holding that N.C. Gen. Stat. § 153A-99 supported claim for wrongful discharge in violation of public policy when county employee alleged defendants fired him due to his political affiliation and activities).

Because the majority opinion does not address the sufficiency of plaintiff Stanley's evidence to support this claim, I do so briefly. When the evidence is viewed in the light most favorable to Stanley, as required on a motion for summary judgment, the evidence shows that Stanley had, prior to being terminated, an exemplary employment record. Stanley, a Republican, has also presented evidence from which a jury could find that Sheriff Bailey, a Democrat, and Stanley's superior officers knew of Stanley's opposition to Sheriff Bailey's reelection. According to Stanley's evidence, Sheriff Bailey sent a letter to employees of the sheriff's department, including Stanley, soliciting contributions for his campaign. Stanley was also approached by superior officers and asked to purchase tickets to fundraisers. When Stanley refused, one of the officers commented: "You know who signs your checks."

Stanley presented further evidence that on 30 November 2010, shortly after Sheriff Bailey won reelection, Stanley was handed a letter of termination by Captain/Major Pummell. When Stanley asked him what the reason was for the termination, Pummell simply turned around and walked away. Subsequent to Stanley's termination, two incident reports were submitted accusing Stanley of having been responsible for

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a roll call disruption by loudly making a comment complaining about the lack of raises and talking about Sheriff Bailey's opponent being elected. One report stated that the incident occurred between 25 and 29 October 2010 while the other report did not indicate the date of the incident. The first report was signed off on by a sergeant on the day of Stanley's termination, while the second report was not signed off on until 6 December 2010. Stanley asserted in an affidavit that both reports were false.

Sheriff Bailey submitted evidence indicating that he fired Stanley for being disruptive – he claimed that Stanley had disrupted the workplace by campaigning for Sheriff Bailey's opponent. The Sheriff submitted testimony from another employee about Stanley being disruptive one morning during roll call and that other employees had indicated that Stanley talked about how much better the Sheriff's Office would be once Sheriff Bailey's opponent got elected.

Stanley presented evidence that he had heard from two sergeants that someone else had, shortly before the election, made a comment about things changing when Sheriff Bailey's opponent was elected. One of the sergeants asked Stanley whether he had made the comment. When Stanley explained that he was out sick the day the comment was made, the other sergeant confirmed that Stanley had in fact been out on the day of the comment.

Given Stanley's evidence of his employment record, the sheriff's soliciting contributions from sheriff's department employees, the sheriff's having knowledge of Stanley's political support for the sheriff's opponent, and the sheriff's claim that Stanley was fired for a politically-motivated disruptive comment, together with Stanley's evidence that he did not make the disruptive comment, I would hold that Stanley has presented sufficient evidence to give rise to a genuine issue of material fact regarding whether Stanley's employment was terminated for a reason in violation of public policy. *See, e.g., Knight v. Vernon*, 214 F.3d 544, 552 (4th Cir. 2000) (holding that plaintiff submitted sufficient evidence that her firing was politically motivated when sheriff asked plaintiff for political loyalty, sheriff's top officers solicited employees for campaign contributions, sheriff accused plaintiff of supporting his opponent, and reason given for termination could be found by jury to be pretext); *Jenks v. City of Greensboro*, 495 F. Supp. 2d 524, 529 (M.D.N.C. 2007) (explaining that plaintiff may establish pretext by showing employer's reliance on false or biased report caused adverse employment action); *Jones v. Cargill, Inc.*, 490 F. Supp. 2d 994, 1006 (N.D. Iowa 2007) ("When the facts are viewed in the light most favorable to Plaintiff, a jury could

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find that this prior ‘record’ was a sham, insofar as Plaintiff was falsely accused of staging the incident because he had repeatedly complained about racial discrimination and harassment.”)

I would, therefore, reverse the trial court’s grant of summary judgment as to Stanley’s wrongful discharge claim. I agree, however, that we should affirm the entry of judgment on plaintiff McLaughlin’s claims.

TONYA M. PRICE, PLAINTIFF
v.
ROBERT CALDER, JR., DEFENDANT

No. COA14-832

Filed 7 April 2015

Immunity—judicial immunity—appointment of attorney as commissioner overseeing partition of property—quasi-judicial official

The trial court did not err by dismissing plaintiff’s complaint on the grounds that defendant real estate attorney had judicial immunity when he was carrying out a partition by sale ordered by the trial court. Defendant, appointed as a commissioner by a clerk of superior court to oversee the partition of property held by co-tenants, was acting within the scope of his duties as a quasi-judicial official. Thus, his actions were covered by the rule of judicial immunity.

Appeal by plaintiff from order entered 12 June 2014 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 3 December 2014.

Randolph M. James for plaintiff-appellant.

Cranfill Sumner & Hartzog, LLP, by Patrick M. Mincey and Kara O. Gansmann, for defendant-appellee.

BRYANT, Judge.

Because defendant—appointed as a commissioner by a Clerk of Superior Court to oversee the partition of property held by co-tenants—was acting within the scope of his duties as a quasi-judicial official, his

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actions were covered by the rule of judicial immunity. Accordingly, we affirm the dismissal of the complaint.

On 29 April 2014, plaintiff Tonya M. Price filed a complaint against defendant Robert Calder, Jr., a real estate attorney, for his conduct while serving as a commissioner over a partition by sale of property jointly owned by plaintiff and her co-tenant, Robert M. Hesch.

Prior to the partition by sale ordered in *Hesch v. Price*, 09-SP-0401, plaintiff had retained defendant as a real estate attorney in at least one real estate transaction. In her complaint, plaintiff alleged that in 2007, she and co-tenant Hesch—with whom she was romantically involved—sold real property in New Hanover County for \$533,000.00. In that transaction, defendant acted on behalf of plaintiff and Hesch.

Plaintiff and Hesch also held other properties as joint tenants with right of survivorship, including property located at 314, 316, and 414 Loder Avenue, Wilmington (the Loder Avenue properties). Plaintiff alleged that Hesch rented the property located at 414 Loder Avenue to a realtor, Jeffery Terry, without accounting to plaintiff for the rent paid by Terry. In addition to being a realtor who had previously listed the property at 414 Loder Avenue for sale, Terry was also Hesch's personal friend.

In a letter to the Wilmington Regional Association of Realtors dated 10 September 2009, plaintiff stated that Terry was residing at the property plaintiff owned jointly with Hesch, that Terry removed a jet-ski lift (a procedure subjecting the property owners to a fine of up to \$10,000.00 if performed without a permit), removed plaintiff's personal belongings from the residence, blocked a boat slip plaintiff had rented out in a commercial venture, had "run up" maintenance fees to be split between the property owners, and was living rent free.

To represent him in proceedings before the Association of Realtors, Terry retained defendant. In her complaint, plaintiff alleged that during the course of his representation of Terry, defendant acted adversely to plaintiff's interests. Plaintiff also alleged that in the course of the proceedings before the Association of Realtors, defendant expressed the opinion that the Loder Avenue properties jointly owned by plaintiff and Hesch should be partitioned. Shortly, thereafter, defendant accepted an appointment by the New Hanover County Clerk of Superior Court as commissioner over the partition of all the Loder Avenue properties.

Plaintiff alleged that she sought an in-kind partition of the Loder Avenue properties as opposed to a partition by sale, but defendant "endorsed" Hesch's desire to partition the property by sale. Plaintiff

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alleged that because of prior dealings, defendant was aware that Hesch had sufficient resources to acquire plaintiff's interest in the Loder Avenue properties. Plaintiff alleged that due to defendant's knowledge of the inequitable financial footing between plaintiff and Hesch, defendant should have known that "the Clerk's Order denying a partition in-kind and instead ordering a sale of plaintiff and Robert Hesch's property was improper"

Plaintiff asserted that as a commissioner appointed by the New Hanover Clerk of Superior Court, defendant owed a fiduciary duty to herself and Hesch, including, an obligation to divide rents collected from Terry between them and maximize the recovery from the sale of the Loder Avenue properties. Plaintiff alleged that as a result of defendant's breach of fiduciary duty during the partition by sale, Hesch and his mother¹ were able to acquire all properties previously held jointly by plaintiff and Hesch, while plaintiff received no money for her interest in the Loder Avenue properties.

Plaintiff sought compensatory and punitive damages against defendant for amounts in excess of \$10,000.00. Defendant answered plaintiff's complaint listing seventeen defenses including judicial immunity.

Following a hearing on the matter in New Hanover County Superior Court before the Honorable Phyllis M. Gorham, Judge presiding, the trial court issued a 12 June 2014 order dismissing plaintiff's complaint pursuant to Rule 12(b)(6) on the basis that "[d]efendant was acting as a judicial official and, thus, had judicial immunity." Plaintiff appeals.

Plaintiff argues that the trial court erred in dismissing her complaint on the grounds that defendant had judicial immunity. Plaintiff contends that defendant was not acting as a judicial official and, thus, had no judicial immunity. We disagree.

"It is well established that 'a judge of a court of this State is not subject to civil action for errors committed in the discharge of his official duties.' " *Sharp v. Gulley*, 120 N.C. App. 878, 880, 463 S.E.2d 577, 578 (1995) (quoting *Fuquay Springs v. Rowland*, 239 N.C. 299, 300, 79 S.E.2d 774, 776 (1954)) (affirming the dismissal of the plaintiff's action against a court-appointed referee in an underlying equitable distribution

1. In her complaint against defendant, plaintiff makes allegations of collusion between Hesch and his mother, and between Hesch, his mother, and Terry, asserting that they all attempted to interfere with plaintiff's rights regarding the Loder Avenue properties.

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proceeding on the basis that such was implicitly an action against the trial judge and barred by judicial immunity). “Quasi-judicial immunity is an absolute bar, available for individuals in actions taken while exercising their judicial function. In effect, the rule of judicial immunity extends to those performing quasi-judicial functions.” *Vest v. Easley*, 145 N.C. App. 70, 73-74, 549 S.E.2d 568, 572 (2001) (citations omitted).

Chapter 1, Article 29A of our General Statutes governs the execution of judicial sales. Pursuant to General Statutes, section 1-338.1, codified within Article 29A, “[a] judicial sale is a sale of property made pursuant to an order of a judge or clerk in an action or proceeding in the superior or district court . . .” N.C. Gen. Stat. § 1-339.1(a) (2013). A commissioner may be specially appointed to hold the sale. *See id.* § 1-339.4(1).

When an order of sale of such real or personal property . . . makes no specific provision for the sale of the property as a whole or in parts, the person authorized to make the sale has authority in his discretion to sell the property by whichever method described in subsection (a) of this section he deems most advantageous.

Id. § 1-339.9(c) (2013) (per subsection (a), the judge or clerk having jurisdiction may direct that the property be sold as a whole, in parts, or offered by each method then sold by the method which produces the highest price).

A commissioner appointed by a court of equity to sell land is empowered to do one specific act, viz., to sell the land and distribute the proceeds to the parties entitled thereto. He has no authority and can exercise no powers except such as may be necessary to execute the decree of the court. Immediately upon his appointment he ceases to be an attorney or agent for either party, but becomes in a certain sense an officer of the court for the specific purposes designated in the judgment.

Peal v. Martin, 207 N.C. 106, 108, 176 S.E. 282, 284 (1934).

The New Hanover County Clerk of Superior Court ordered that the property jointly owned by plaintiff and Hesch was to be partitioned by sale. The trial court order for partition by sale was acknowledged by plaintiff in her complaint. Defendant was appointed by the Clerk of Court as the commissioner for the partition proceeding referenced in *Hesch v. Price*, 09 SP-0401, New Hanover County. Therefore, in carrying out the partition by sale, defendant was acting “in a certain sense [as]

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an officer of the court.” *See id.* at 108, 176 S.E. at 284. We find no merit in plaintiff’s assertion that defendant was not acting in accordance with his duty as commissioner appointed to carry out a partition by sale of property jointly held by plaintiff and Hesch. Therefore, defendant was immune from suit while engaging in this function. *See Vest*, 145 N.C. App. at 73-74, 549 S.E.2d at 572 (“Quasi-judicial immunity is an absolute bar, available for individuals in actions taken while exercising their judicial function. In effect, the rule of judicial immunity extends to those performing quasi-judicial functions.” (citation omitted)). Accordingly, we affirm the trial court’s dismissal of plaintiff’s complaint.

AFFIRMED.

Judges DILLON and DIETZ concur.

R & L CONSTRUCTION OF MT. AIRY, LLC, PLAINTIFF

v.

JAVIER DIAZ, DEFENDANT AND F. EUGENE REES, JR., THIRD-PARTY DEFENDANT

No. COA14-1127

Filed 7 April 2015

Attorney Fees—statutory lien—scant record on appeal

The Court of Appeals held that the trial court did not abuse its discretion by awarding attorney fees under N.C.G.S. § 44A-35 to the prevailing party in a contract dispute, but the prevailing party was not entitled to attorney fees incurred on appeal. Neither party included transcripts or other evidence from the hearing on the underlying action or attorney fees.

Appeal by plaintiff from order entered 4 August 2014 by Judge L. Todd Burke in Surry County Superior Court. Heard in the Court of Appeals 18 February 2015.

Royster & Royster, by Mark S. Royster, for plaintiff-appellant.

Smith Law Group, PLLC, by Steven D. Smith and Matthew L. Spencer, for defendant-appellee.

TYSON, Judge.

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R & L Construction of Mt. Airy, LLC (“Plaintiff”) appeals from order awarding attorneys’ fees to Javier Diaz (“Defendant”). We affirm.

I. Factual Background

In June 2012, Plaintiff entered into a contract with Defendant to provide labor and materials for the renovation of a residence located in Surry County, North Carolina. Plaintiff performed its contractual obligations between 9 July 2012 and 24 August 2012.

Defendant failed to pay the balance due. Plaintiff filed a claim of lien on Defendant’s real property in the amount of \$11,175.49 on 7 December 2012. Plaintiff subsequently filed a complaint to perfect the lien against Defendant on 20 February 2013.

Plaintiff asserted claims against Defendant for breach of contract and for satisfaction of its lien on real property. Plaintiff alleged it furnished labor and materials in accordance with the contractual specifications for a total value of \$16,175.49. Defendant made one payment of \$5,000.00. Plaintiff repeatedly demanded Defendant pay the remaining balance due pursuant to the parties’ contract. Defendant refused to pay the balance of the outstanding debt. Defendant filed an answer and third party counterclaim against F. Eugene Rees, Jr., a manager of Plaintiff.

On 27 November 2013, the parties entered into court-ordered mediation. During mediation, Plaintiff reduced its demand from \$11,175.49 to \$9,000.000. Defendant rejected Plaintiff’s final settlement offer. Nothing before us shows any further settlement discussions took place after that date.

On 12 March 2014, Defendant filed a motion for summary judgment. On 9 June 2014, the trial court granted Defendant’s motion for summary judgment, dismissed Plaintiff’s claims against Defendant, and cancelled Plaintiff’s claim of lien on the real property.

On 25 June 2014, Defendant filed a motion for an award of attorneys’ fees pursuant to N.C. Gen. Stat. § 44A-35. Defendant alleged he “made multiple good faith attempts to fully resolve the matter, including but not limited to a settlement offer at mediation, which the Plaintiff has unreasonably refused.”

After hearing Defendant’s motion for attorneys’ fees, on 4 August 2014 the trial court entered an order awarding attorneys’ fees to Defendant in the amount of \$8,823.00. In its order, the trial court made the following findings of fact:

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1. The Plaintiff filed a claim of lien in the amount of \$11,175.49 . . . pursuant to Chapter 44A of the North Carolina General Statutes and filed a lawsuit to collect same.
2. Plaintiff made a final settlement demand of \$9,000.00 at the mediation of this matter *which was thereby rejected by the Defendant*, constituting an unreasonable refusal to fully resolve the matter and in light of Defendant being granted summary judgment on Plaintiff's claims against the Defendant and the Plaintiff receiving no recovery. Therefore, Defendant was and is the prevailing party of this case pursuant to N.C. Gen. Stat. §44A-35 due to the amount of the claim of lien filed by the Plaintiff.
3. Defendant incurred \$8,823.00 of attorney time, up and until November 30, 2014, defending and prosecuting his claims [based on the affidavit submitted by counsel for Defendant].

(emphasis supplied).

Plaintiff timely appealed to this Court. Defendant filed a motion with this Court seeking an award of attorneys' fees incurred on appeal.

II. Issues

Plaintiff argues the trial court made an improper finding that Plaintiff unreasonably refused to resolve the matter at mediation and erred by granting Defendant's motion for attorneys' fees.

III. Standard of Review

This Court reviews a trial court's award of attorneys' fees under N.C. Gen. Stat. § 44A-35 for abuse of discretion. *Martin Architectural Prods. Inc. v. Meridian Constr. Co.*, 155 N.C. App. 176, 182, 574 S.E.2d 189, 193 (2002). "To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Nationwide Mut. Fire Ins. Co. v. Bournlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 45 (2005), *aff'd per curiam*, 360 N.C. 356, 625 S.E.2d 779 (2006) (citations omitted).

IV. Analysis

Pursuant to N.C. Gen. Stat. § 44A-35,

[i]n any suit brought or defended under the provisions of Article 2 or Article 3 of this Chapter, the presiding

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judge may allow a reasonable attorneys' fee to the attorney representing the prevailing party . . . payable by the losing party upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit or the basis of the defense. For purpose of this section, "prevailing party" is a party . . . who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim or is a party . . . against whom a claim is asserted which results in a judgment of less than fifty percent (50%) of the amount sought in the claim defended.

N.C. Gen. Stat. § 44A-35 (2013).

N.C. Gen. Stat. § 44A-35 permits a trial judge to award attorneys' fees provided two elements are satisfied: (1) the party awarded attorneys' fees is the prevailing party; and (2) the party required to pay the attorneys' fees unreasonably refused to resolve the matter. *S. Seeding Serv., Inc. v. W.C. English, Inc.*, __ N.C. App. __, __, 735 S.E.2d 829, 835 (2012).

In this case, the trial court made the following finding of fact in its order, which awarded attorneys' fees to Defendant:

2. Plaintiff made a final settlement demand of \$9,000.00 at the mediation of this matter *which was thereby rejected by the Defendant*, constituting an unreasonable refusal to fully resolve the matter and in light of Defendant being granted summary judgment on Plaintiff's claims against the Defendant and the Plaintiff receiving no recovery. Therefore, Defendant was and is the prevailing party of this case pursuant to N.C. Gen. Stat. §44A-35 due to the amount of the claim of lien filed by the Plaintiff.

(emphasis supplied).

Plaintiff does not dispute Defendant was the prevailing party. Plaintiff contends no competent evidence exists to support the trial court's finding of fact that Defendant's rejection of Plaintiff's final settlement offer at mediation constituted an unreasonable refusal to settle.

Plaintiff has failed to meet its burden of showing "the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Bourlon*, 172 N.C. App. at 601, 617 S.E.2d at 45. Plaintiff failed to appeal the trial court's order granting Defendant's motion for summary judgment of the underlying action. Plaintiff also

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failed to include in the record on appeal any transcript from either the hearing on Defendant's motion for summary judgment or the hearing on Defendant's motion for attorneys' fees. Without a review of the transcripts, this Court cannot determine what arguments were made at the hearings on either of these two motions.

The evidence in the record before this Court, including the order awarding attorneys' fees to Defendant, shows the trial court found and concluded Plaintiff's refusal to settle was unreasonable. Because no transcript of the hearing was filed with the record on appeal, this Court is also unable to ascertain how statutorily confidential information under N.C. Gen. Stat. § 70A-38.1, such as an offer to settle in a court-ordered mediation procedure, was entered into evidence and considered by the trial judge.

The trial court made the requisite findings of fact, based upon the stated actions at mediation *and* "the affidavits, including affidavit of fees and other evidence submitted by the parties and the arguments and authorities presented by counsel and a full review of the file," to support its conclusions of law and its order awarding attorneys' fees to Defendant. Plaintiff failed to show the trial court's award of attorneys' fees was manifestly unsupported by reason. This argument is overruled.

V. Defendant's Motion for Attorneys' Fees Incurred on Appeal

Defendant moves for the imposition of attorneys' fees incurred on appeal, pursuant to Rule 35 and Rule 37 of the North Carolina Rules of Appellate Procedure. Rule 35(a) allows costs to be taxed against the appellant if a judgment is affirmed, "unless otherwise ordered by the court." N.C.R. App. P. 35(a). "Any costs of an appeal that are assessable in the trial tribunal shall, upon receipt of the mandate, be taxed as directed therein and may be collected by execution of the trial tribunal." N.C.R. App. P. 35(c). Assessable costs include "counsel fees, as provided by law." N.C. Gen. Stat. § 7A-305(d)(3) (2013).

The trial court determined Defendant was entitled to an award of attorneys' fees under N.C. Gen. Stat. § 44A-35 and entered an order thereon. In his motion submitted to this Court, Defendant contends he is likewise entitled to an award of attorneys' fees incurred in defending the trial court's order on appeal.

As stated previously, neither party filed any transcripts or presented any evidence, other than the order appealed, to allow us to decipher how statutorily confidential information was admitted into evidence, or what other evidence the trial court considered.

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In the absence of a transcript, or other evidence in the record to review, we reject an additional award to Defendant of attorneys' fees incurred on appeal.

VI. Conclusion

The trial court's order granting Defendant's motion for attorneys' fees is affirmed. Neither party included transcripts or other evidence of the hearing on the underlying action or the hearing on Defendant's motion for attorneys' fees. Defendant's motion for attorneys' fees incurred on appeal is denied.

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

RUTHERFORD ELECTRIC MEMBERSHIP CORPORATION, PLAINTIFF

v.

TIME WARNER ENTERTAINMENT-ADVANCE/NEWHOUSE PARTNERSHIP, D/B/A
TIME WARNER CABLE, AND TIME WARNER CABLE SOUTHEAST, LLC, DEFENDANTS

No. COA14-905

Filed 7 April 2015

1. Utilities—telephone pole attachment—cable provider—rates not just and reasonable

The Business Court did not err in its findings of fact and conclusion of law that the rates Rutherford Electric Membership Corporation (Rutherford) charged TWEAN (a cable service provider) between 2010 and 2013 for use of utility poles were not just and reasonable under N.C.G.S. § 62-350. Rutherford did not specifically challenge any of the order and opinion's factual findings, but instead contended that the Business Court misapprehended the General Assembly's intent in enacting N.C.G.S. § 62-350, leading to an absurd result. Rutherford offered several arguments in support of its position, none of which had merit. These involved use of the FCC Cable Rate, the effect of Rutherford's uniform class-based rates, the state law presumptions to which Rutherford referred, and Rutherford's failure to present any competent evidence that its rates were just and reasonable.

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2. Utilities—telephone pole attachment—negotiation of rates

The Business Court did not err by concluding that Rutherford Electric Membership Corporation violated N.C.G.S. § 62-350 when it unilaterally raised the pole attachment rates of TWEAN (a cable service provider) without negotiation. The plain language of N.C.G.S. § 62-350 requires a utility pole owner to allow CSPs to attach to their poles at just, reasonable, and nondiscriminatory rates, terms, and conditions adopted pursuant to negotiated or adjudicated agreements.

Appeal by Plaintiff from order and opinion entered 22 May 2014 by Judge Calvin E. Murphy in the North Carolina Business Court. Heard in the Court of Appeals 4 December 2014.

Nelson Mullins Riley & Scarborough LLP, by Joseph W. Eason and Christopher J. Blake, for Plaintiff.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Reid L. Phillips; and Sheppard Mullin Richter & Hampton LLP, by Gardner F. Gillespie, Paul Werner, and J. Aaron George, for Defendant.

Womble Carlyle Sandridge & Rice, LLP, by Pressly M. Millen and Raymond M. Bennett, for amicus curiae North Carolina Association of Electric Cooperatives, Inc.

The Bussian Law Firm, PLLC, by John A. Bussian, for amicus curiae North Carolina Cable Telecommunications Association.

STEPHENS, Judge.

Rutherford Electric Membership Corporation (“Rutherford”) argues that the North Carolina Business Court erred in holding that the utility pole attachment rates it charged Time Warner Cable Entertainment-Advance/Newhouse Partnership (“TWEAN”)¹ between 2010 and 2013 were neither just nor reasonable under section 62-350 of our General Statutes. Rutherford also argues that the Business Court erred in concluding that it violated section 62-350 by unilaterally raising TWEAN’s rates without negotiation during the years in dispute. After careful

1. This dispute arose in 2010 between Rutherford and TWEAN. In 2012, TWEAN’s corporate subsidiary Time Warner Southeast, LLC, assumed all of its parent company’s rights, obligations, and liabilities relating to cable operations in North Carolina, and was subsequently joined as a necessary party to this litigation.

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consideration, we hold that the Business Court did not err and we consequently affirm its order and opinion.

*I. Background and Procedural History**A. Regulatory Background*

For approximately 35 years, the Federal Communications Commission (“FCC”) has regulated the pole attachment rates that certain utility companies may charge cable service providers within North Carolina and around the nation. Section 224 of the federal Pole Attachment Act of 1978 amended the Communications Act of 1934 to provide that investor-owned utilities (“IOUs”) may only charge utility pole attachment rates that are just and reasonable, based on the utility’s incremental costs incurred in providing a pole attachment service and an appropriate share of its fully allocated costs, which would exist even in the absence of any pole attachments. *See* 47 U.S.C. § 224 (2014). Developed pursuant to section 224’s enactment, the FCC Cable Rate provides a formula for charging an attaching party a percentage of the actual, documented costs of owning and maintaining a utility pole based on the proportion of the usable space² on the pole occupied by the attacher. *See id.* § 224(d). In 1996, Congress amended section 224 to include an alternative formula called the FCC Telecom Rate, which followed a similar approach for calculating the cost of a pole but utilized a different method for allocating those costs to attachers by including both usable and unusable pole space into its calculations for the amount of space each attacher occupies. *See id.* § 224(e). However, in 2011, the FCC adjusted the Telecom Rate formula to produce maximum rates more closely aligned with those provided by the FCC Cable Rate.

Unlike IOUs, municipally owned utilities and non-profit electric membership corporations (“EMCs”) are exempt from federal regulation by the FCC. Thus, given the absence of any comparable state legislation here in North Carolina prior to 2009, pole attachment rates

2. Utility poles come in standard sizes, typically in five-foot increments, and utilities usually use 35- and 40-foot poles for distribution of electricity and communications services. Of that space, utilities bury approximately six feet of the pole underground. Then, to meet “minimum grade” and achieve ground clearance, the utility typically leaves at least 18 feet of pole space unused between the ground and any installation. As such, every utility pole has roughly 24 feet of unusable space either buried underground or required to achieve minimum ground clearance. Thus, each 35- and 40-foot pole has 11 feet and 16 feet, respectively, of usable space to accommodate overhead facilities, and the FCC Cable Rate therefore uses a presumptive average of 13.5 feet of usable space per pole, although the formula allows a utility to substitute its actual data where available.

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went effectively unregulated for such utilities providers. Indeed, when TWEAN attempted to challenge the pole attachment rates set by a North Carolina EMC in federal court in 2007 under common law principles, the United States Court of Appeals for the Fourth Circuit flatly rejected its argument and held that, “if any regulation or compulsion is to be applied to pole-attachment agreements, it should be done by the North Carolina legislature, the North Carolina Utilities Commission, [or] the North Carolina state courts.” *Time Warner Entmt-Advance/Newhouse P’ship v. Carteret-Craven Elec. Membership Corp.*, 506 F.3d 304, 315 (4th Cir. 2007). In so holding, the Fourth Circuit set the stage for our General Assembly’s enactment of N.C. Gen. Stat. § 62-350.

As enacted in 2009, section 62-350 requires that municipalities and EMCs organized under Chapter 117 of our General Statutes “shall allow any communications service provider to utilize [their] poles, ducts, and conduits at just, reasonable, and nondiscriminatory rates, terms, and conditions adopted pursuant to negotiated or adjudicated agreements.” N.C. Gen. Stat. § 62-350(a) (2013). Included in the definition of “communications service provider” (“CSP”) are those that provide “cable service over a cable system as those terms are defined in Article 42 of Chapter 66 of the General Statutes.” *Id.* § 62-350(e). The statute further provides that:

Following receipt of a request from a communications service provider, a municipality or membership corporation shall negotiate concerning the rates, terms, and conditions for the use of or attachment to the poles, ducts, or conduits that it owns or controls. . . . Upon request, a party shall state in writing its objections to any proposed rate, terms, and conditions of the other party.

Id. § 62-350(b). However, if the parties are unable to reach an agreement “within 90 days of a request to negotiate . . . , or if either party believes in good faith that an impasse has been reached . . . , either party may bring an action in [the North Carolina Business Court] . . . , and the Business Court shall have exclusive jurisdiction over such actions.” *Id.* § 62-350(c). In such cases, the statute provides that the Business Court shall

resolve any dispute identified in the pleadings consistent with the public interest and necessity so as to derive just and reasonable rates, terms, and conditions, taking into consideration and applying such other factors or evidence that may be presented by a party, including without

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limitation the rules and regulations applicable to attachments by each type of communications service provider under section 224 of the Communications Act of 1934, as amended, and [] apply any new rate adopted as a result of the action retroactively to the date immediately following the expiration of the 90-day negotiating period or initiation of the lawsuit, whichever is earlier.

Id. In the only case heretofore brought under this statute, this Court interpreted section 62-350 to “endorse[] regulatory intervention to promote just and reasonable rates” by “establish[ing] several judicially enforceable statutory rights” including “a statutory right for both [CSPs] and municipalities to establish just, reasonable, and nondiscriminatory pole attachment rates within 90 days of a request to negotiate” and “a private cause of action to enforce these rights.” *Time Warner Entm’t Advance/Newhouse P’ship v. Town of Landis*, __ N.C. App. __, __, 747 S.E.2d 610, 615-16 (2013) (citations and internal quotation marks omitted).

B. Facts and Procedural History

Rutherford is an EMC organized under Chapter 117 of our General Statutes that owns and operates an electric distribution system consisting of overhead and underground lines used to provide electric service to its members in its service territory, which covers all or portions of 10 North Carolina counties. As part of its system, Rutherford owns utility poles to which it attaches its overhead distribution lines. Rutherford also maintains “joint-use” arrangements with incumbent local telephone companies and electric utilities under which Rutherford typically does not pay for its use of space on the other party’s poles, nor does it charge the other party for using space on its poles; instead, the joint-user pays the pole owner for any expenses associated with accommodating its facilities. In addition, Rutherford licenses the use of surplus space on its poles to CSPs and other third-party attachers.

On 5 March 1998, Rutherford and TWEAN entered into a pole attachment agreement, the terms of which largely followed Rutherford’s standard third-party CSP attachment agreement and obligated TWEAN to pay an annual, per-pole rental rate of \$5.25 in exchange for the right to attach to surplus space on Rutherford’s poles. The agreement provided that where there was no surplus space on a pole, including sufficient safety space and ground clearance, TWEAN would create space by purchasing a new, larger pole, entirely at its own expense. Moreover, if Rutherford reclaimed space on the pole for its own attachments, TWEAN either had to move its attachment to create new safety space

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or, if there was insufficient space to maintain minimum requirements for ground clearance or safety space, pay to install a taller pole. In both cases, the agreement provided that Rutherford would take ownership of the new pole and TWEAN would continue paying the same rate to attach to it.

In 1999, Rutherford increased the rate it charged TWEAN to \$5.50 per pole. In 2004, Rutherford exercised its option to terminate the 1998 pole attachment agreement and the parties spent the next eight years unsuccessfully attempting to reach a new agreement, while Rutherford continued to invoice TWEAN for its attachments at gradually increased rates. In 2005, the rate was \$7.50 per pole; in 2006, \$9.50 per pole; in 2007, \$11.50 per pole; in 2008, \$12.50 per pole; in 2009, \$14.50 per pole; in 2010, \$15.50 per pole; in 2011, \$18.50 per pole; in 2012, \$19.19 per pole; and in 2013, \$19.65 per pole.

Prior to section 62-350's enactment, TWEAN lacked any means to challenge Rutherford's rates and thus continued to pay the amounts invoiced until 2009. Then, on 18 December 2009, TWEAN objected to Rutherford's invoiced rates and requested negotiations for the rate, terms, and conditions of a new license agreement pursuant to section 62-350. Over the next 39 months, the parties negotiated in good faith but were unable to reach an agreement. In the meantime, TWEAN refused to pay Rutherford's 2010 rate of \$15.50 per pole and instead paid the 2009 rate of \$14.50 per pole, subject to a true-up based on a negotiated or adjudicated rate and without prejudice to either party. In response, Rutherford threatened to demand removal of 481 TWEAN attachments, which was the number of poles equal to the amount of the outstanding balance, unless TWEAN paid the full invoiced amount for 2010. TWEAN responded by letter that Rutherford did not have the authority to unilaterally raise its rates or remove its attachments, and continued to pay \$14.50 per pole, subject to true-up and without prejudice, through 2011 and 2012 while Rutherford continued to demand payment of the unpaid invoices and refused to provide TWEAN with financial data and documents that it requested in conjunction with the ongoing negotiations. In 2013, TWEAN offered to pay Rutherford's invoices at a rate of \$7.50 per pole, but Rutherford objected and refused to accept any such payment. By February 2013, after more than three years of unsuccessful negotiations, the parties reached an impasse as to the maximum permissible rates under section 62-350 for the years 2010 through 2013. During these years, Rutherford invoiced TWEAN for attachments on the following number of poles: 7,269 poles in 2010; 7,336 poles in 2011; 7,336 poles in 2012; and 7,384 poles in 2013. All of TWEAN's attachments were

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concentrated in two of the 10 counties in Rutherford's service area, near Gastonia in Gaston County and Shelby in Cleveland County.

On 1 March 2013, Rutherford filed a complaint against TWEAN seeking adjudication under section 62-350 of the lawfulness of its rates for 2010 through 2013, as well as a money judgment for amounts invoiced to but unpaid by TWEAN and a declaratory judgment that its rates would be considered just and reasonable going forward. The case was designated a mandatory complex business case on 7 March 2013 and subsequently assigned to the North Carolina Business Court on 12 March 2013. In its answer filed 4 April 2013, TWEAN asserted affirmative defenses and counterclaimed that: (1) Rutherford's pole attachment rate was neither just nor reasonable under section 62-350; (2) Rutherford violated section 62-350 by continuing to increase its rates without negotiation; and (3) several of Rutherford's non-rate terms also violated section 62-350. On 1 August 2013, the Business Court joined TWEAN's corporate subsidiary TWC Southeast, LLC, as a necessary party to the litigation. The parties resolved their disputes over Rutherford's non-rate terms before trial.

On 3 September 2013, with Judge Calvin E. Murphy presiding, the Business Court began a four-day bench trial to determine whether Rutherford's pole attachment rates for 2010 through 2013 were just and reasonable under section 62-350. Given the statute's explicit reference to "section 224 of the Communications Act of 1934," TWEAN argued that the court should base its determination on the FCC Cable Rate, which calculates the maximum rate an IOU can charge by: (1) determining the net cost of an average utility pole; (2) multiplying that cost by carrying charge factors to determine the utility's annual cost of owning and maintaining an average pole; and then (3) allocating a portion of that annual cost to the third-party attacher proportionate to the amount of usable space on the pole it occupies. *See* 47 U.S.C. § 224(d). For its part, Rutherford generally agreed that the cost of a pole should be calculated based on the first two elements of the FCC Cable Rate, but strenuously objected to allocating those costs based on the formula's third element, which Rutherford contended would result in a subsidy to TWEAN at the expense of its member-owners. Instead, Rutherford argued for a rate based on the allocation of both usable and unusable pole space to third-party attachers like TWEAN.

During the trial, Rutherford presented testimony from three witnesses in support of its rates. First, Rutherford's system engineer Thomas Haire, whose duties included overseeing the development and negotiation of rates, terms, and conditions for pole attachment agreements, testified that he relied on a combination of formulaic rate methodologies

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from the “Pole Attachment Toolkit” published by the National Rural Electric Cooperatives’ Association (“NRECA”) in order to gradually increase attachment rates for TWEAN and nearly all of Rutherford’s other third-party attachers to make them closer to the rates charged under its agreement with Bell South.³ Specifically, Haire testified that Rutherford was willing to follow the FCC Cable Rate as a guide as long as it produced a sufficient maximum rate to justify the desired annual rate increase. When that failed, Haire turned to NRECA’s Telecom Plus formula, which uses calculations identical to the FCC Cable Rate to derive the annual net cost of owning and maintaining a pole, but differs in its allocation of costs. Unlike the FCC Cable Rate, which allocates the costs of the entire pole in the proportion that the attaching party uses the usable space, the Telecom Plus formula allocates the pole’s usable space in the same manner but then further allocates its unusable space equally among all of the attaching parties. Here, Haire testified that he allocated the unusable space by dividing the costs by Rutherford’s system-wide average of attaching parties per pole. Thus, Haire testified that his calculations—which presumed a standard 40-foot pole⁴ with 13.5 feet of usable space of which Rutherford utilized 6.5 feet and every CSP attachment occupied 4.33 feet—produced a range of potential attachment rates that were higher than the rates Rutherford actually charged TWEAN, thus rendering the latter just and reasonable under section 62-350. Furthermore, echoing the testimony of several other Rutherford witnesses, Haire testified that by 2012, Rutherford had licensing agreements with ten third-party attachers including TWEAN; that although several other attachers had complained about Rutherford’s pole attachment rate, TWEAN was the only attacher that refused to pay it; and that

3. Under the terms of its joint-use agreement with Bell South (now AT&T), Rutherford agrees to install, at its own expense, poles large enough to insure sufficient space for Bell South to make an attachment, which means that if a jointly used pole is insufficient in size or strength to accommodate existing attachments and Bell South’s proposed attachments, Rutherford will pay the cost to promptly replace the pole with a taller, stronger one. Bell South and Rutherford also agreed to use a 40-foot pole as the standard joint-use pole with a standard space allocation of two feet for Bell South’s attachments and 8.5 feet for Rutherford’s attachments. Further, the agreement gives Bell South priority by specifying that any attachments by third parties would “not be located within [two feet of Bell South’s] space allocation.” The agreement requires each party to pay an annual per-pole rental fee for its attachments on the other’s poles. In 2012, Bell South paid \$18.12 per pole for 18,335 attachments to Rutherford’s poles, and Rutherford paid \$24.98 for each of its 1,026 attachments to Bell South’s poles.

4. Haire testified that Rutherford had previously used 35-foot poles throughout its system, but that over the last 25 years, it transitioned to using 40-foot poles, at least in part to accommodate its joint-use agreements with other utilities.

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Rutherford generally refused to lower or even negotiate its pole attachment rate with individual attachers because it was required to charge nondiscriminatory and uniform class-based rates.

On cross-examination, Haire explained that even though an average CSP attachment occupies only one foot of space, Rutherford attributed 4.33 feet to TWEAN's attachments based on the National Electric Safety Code's ("NESC") requirement that poles with communications facilities maintain sufficient "safety space"—typically 40 inches—between those communications facilities and electrical conductors. However, Haire acknowledged that the NESC allows electric utilities like Rutherford to use this safety space for certain types of attachments provided they maintain minimum separations, and further admitted that on at least some of its poles, Rutherford generated revenue by using the safety space to install streetlights. Haire also admitted that although NRECA's Telecom Plus formula calls for dividing the cost of unusable space equally among all attachers, his calculations based on Rutherford's system-wide averages divided the cost of unusable space by only 1.45 attaching parties, which resulted in a higher rate. Haire explained this was necessary because Rutherford lacked data on how many of its poles with TWEAN attachments included other attachers besides Rutherford itself. He further acknowledged that in determining the annual average costs of Rutherford's poles, he miscalculated the carrying charge component by failing to divide Rutherford's maintenance expenses by its net investment in overhead conductors and service lines, and he also erroneously used a "default" rate of return rather than Rutherford's actual rate of return, even though he had no basis to use the default and the default was higher than the rate of return used by Rutherford's other experts. Haire also admitted that the NRECA toolkit he relied on described the FCC's rate methodologies as "unimpeachable" and cautioned that although the Telecom Plus formula generated higher pole attachment rates by allocating more costs to attachers, "it has not been sanctioned by the FCC and may not be readily embraced by state or federal regulators."

Rutherford next presented expert testimony from Judy Beacham, an outside consultant who acknowledged that she had never previously performed a pole attachment rate analysis and that in formulating her rate methodology she relied primarily on a position paper prepared by a lawyer for the National Association of Regulatory Utility Commissioners ("NARUC") on behalf of a number of IOUs for presentation to the FCC in 1996. After testifying about the history of EMCs, their importance in bringing electrical power to sparsely populated rural areas, and the

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impact of their tax-exempt non-profit status on their costs and finances, Beacham offered calculations that followed the basic outlines of the Telecom Plus rate methodology. However, Beacham acknowledged that her calculations departed from NRECA's formula in several notable ways. First, Beacham increased the cost of a bare utility pole in Rutherford's system by adding in the costs of ancillary supporting equipment, such as anchors, guys, grounds, and lightning arresters, which would be on any pole to support the utility's core services regardless of whether there were any attachments. Second, Beacham added to the expenses included in the carrying charge, including a category called "operations related expenses" that is not found in the FCC Cable Rate or NRECA's Telecom Plus formula. Third, while Beacham purported to follow the Telecom Plus method for allocating unusable space, she acknowledged that her calculations were missing critical data inputs because although her approach required information on the number of entities attached to an average joint-use pole, Rutherford kept no such statistics. Indeed, Beacham admitted that if the average pole to which TWEAN attached had more than 2.4 attaching entities, or that if a third entity such as Bell South was attached to 40 percent or more of Rutherford's poles to which TWEAN was also attached, her methodology would not justify Rutherford's rates. On cross-examination, Beacham admitted she was unaware of the fact that in 2001, NARUC's board resolved that states should regulate all pole attachment rates, including those for municipalities and EMCs, according to the FCC Cable Rate "because it is simple, it is fair and reasonable, it uses readily identifiable information and it avoids disputes."

Finally, Rutherford offered expert testimony from Gregory Booth, an engineer who performed a rate analysis as well as a Times Interest Earned Ratio ("TIER") analysis on Rutherford's rates. Booth's rate analysis combined several formulas to calculate a range of maximum just and reasonable rates based on an equal allocation of the usable and unusable space occupied by the attacher. However, despite his testimony that the costs of unusable pole space should be paid for evenly by each party that occupies the pole, Booth employed the same unusable space allocation methodology as Haire, dividing the unusable space by 1.45 rather than recognizing that, by definition, each of Rutherford's poles to which TWEAN attaches must have a minimum of two attachers—i.e., TWEAN and Rutherford. Booth defended his space allocation methodology by claiming that the average pole TWEAN attaches to is more expensive for Rutherford, but Rutherford presented no evidence to support this assertion, nor did it present any data about how many (or which) poles in its system have one or more third-party attachments. Also like Haire, Booth allocated 100% of the NESC-required safety space

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to TWEAN in his calculations, thereby increasing the one-foot of usable space TWEAN's attachments occupy by an additional 40 inches, which he justified by reasoning that were it not for TWEAN's attachments, the safety space would not be required and Rutherford would be able to make fuller use of the usable space on its poles. Unlike Haire, Booth's calculations for determining Rutherford's costs and the amount of space to allocate per attacher utilized an average of only 10.83 feet of usable space per pole.

Based on his TIER analysis, Booth claimed that even at its current pole attachment rates, financially speaking, Rutherford's bottom line would be better off without any third-party communication attachments like TWEAN's, although his analysis relied on the assumption that the only reason Rutherford uses 40-foot poles, instead of cheaper 35-foot poles, is to provide pole attachment space for TWEAN and other communications licensees. Moreover, Booth testified that while Rutherford might eventually recoup its investment in those more expensive poles at its present attachment rates, applying the FCC Cable Rate would amount to an improper subsidy for TWEAN at the expense of Rutherford's member-owners.

To support its argument that Rutherford's rates for the disputed years were neither just nor reasonable under section 62-350, TWEAN relied on expert testimony from economist Patricia Kravtin. She testified that by applying the FCC Cable Rate to Rutherford's financial data, the maximum just and reasonable pole attachment rates for each year in question were \$2.68 in 2010, \$2.56 in 2011, \$2.57 in 2012, and \$2.64 in 2013. She also offered alternative calculations based on the higher inputs Rutherford's experts used to determine the net bare costs of a pole, which resulted in a slight increase in the maximum just and reasonable pole attachment rates for the disputed years to \$3.63 for 2010, \$3.51 for 2011, \$3.51 for 2012, and \$3.55 for 2013. As Kravtin explained, the differences between her rate calculations and those proposed by Rutherford's experts were driven primarily by Rutherford's method of allocating unusable pole space to TWEAN and other third-party attachers. Kravtin testified that in her view, by charging attachers in proportion to the usable space they occupy on the pole, the FCC Cable Rate provides a more just and reasonable allocation of costs, in the same way that it makes more sense to charge a tenant who occupies only one floor of a ten-story apartment building 10 percent of the costs of the building's common space. Kravtin also took issue with Booth's allocation of 100 percent of the NESC-required safety space to the attacher, given the evidence that Rutherford still made use of the space itself, and with Booth's argument that applying the FCC Cable Rate would result in a

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subsidy for TWEAN, arguing instead that if anything, attachments leave utilities like Rutherford in a better position economically because they can generate additional revenue by utilizing surplus space on their poles while attachers pay the resulting incremental cost increases. Moreover, Kravtin testified that although it was initially intended to apply only to IOUs, the FCC Cable Rate is more widely applicable and more straightforward to calculate than the formulas Rutherford's experts relied on because it utilizes clear, readily accessible data inputs and presumptive averages rather than detailed statistics that EMCs including Rutherford simply do not maintain.

On 22 May 2014, the Business Court issued an order and opinion holding that the pole attachment rates Rutherford charged TWEAN between 2010 and 2013 are unjust and unreasonable under section 62-350, and that Rutherford violated section 62-350 by unilaterally increasing its rates during those years without first negotiating with TWEAN. In its findings of fact, the Business Court noted that although section 62-350 allows it to consider and "apply other evidence presented by the parties to determine whether [Rutherford's] rates are just and reasonable, the Court looks first to the FCC's methods for setting maximum just and reasonable pole attachment rates, given the express instruction for the Court to consider the FCC approach outlined in Section 224." The Court further found that the FCC Cable Rate "provides an economically justified means of reasonably allocating costs" and "promotes uniformity in pole attachment rates across the state" because its formula is "applicable to all manner of utilities regardless of differences in costs, the number of attaching entities, or other variables." Indeed, as the Court noted, even NRECA, which promulgated the Telecom Plus formula on which Rutherford's experts partially relied, has stated that rates established according to the FCC's rules are "unimpeachable" because "the FCC rate formulas are sanctioned by the U.S. Congress, have been adopted by most of the states that regulate pole attachments and are the most widely accepted methodologies for calculating pole attachment rates." Thus, the Business Court found that

it is appropriate to consider the rates yielded by the FCC Cable Rate formula in determining whether [Rutherford's] rates are just and reasonable. Not only is the Court directed to do so by § 62-350, but, by applying the facts presented in this case to an analytical structure that is well-understood, widely used, and judicially sanctioned, the Court is assured that it is not exceeding its judicial function. Moreover, the Court expects that reliance on

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established FCC precedent will, as the General Assembly intended, provide helpful guidance to parties involved in future negotiations over just and reasonable pole attachment rates, terms, and conditions.

However, the Court also emphasized that “this finding is based on the facts presented at trial in this case, and does not limit the Court from considering other methods of proving just and reasonable rates in future cases that may be brought under § 62-350.”

The Business Court found that TWEAN’s expert Kravtin was the only witness to provide credible evidence of what Rutherford’s maximum just and reasonable rate would be under the FCC Cable Rate formula. Despite Rutherford’s objections, it further found that Kravtin’s use of the FCC Cable Rate’s presumptive average of 13.5 feet of usable space per pole when deriving the space allocation factor “was reasonable given the lack of complete data from [Rutherford] on the average usable space on an average pole in its system.”

By contrast, the Business Court found that the different rate methodologies that Rutherford’s experts offered as proof that its rates were just and reasonable conflicted with each other and were not supported by credible evidence. As the Court noted, Rutherford’s experts relied on NRECA’s Telecom Plus formula and other methodologies which have “not been adopted by any court or administrative agency as a means of establishing a maximum just and reasonable rate.” Moreover, the Court found that the evidence before it did not justify Rutherford’s use of the Telecom Plus formula’s equal allocation of unusable space in light of the unequal rights and benefits accruing to the parties under its standard third-party CSP attachment agreement. Nevertheless, the Court noted that it “might have been swayed by [Rutherford’s] arguments regarding the equal allocation of the unusable space, if the attachers shared equal rights to the pole and the cost was indeed equally allocated.” However, even assuming *arguendo* that Rutherford’s decision to allocate unusable space to attachers was a defensible method for calculating a reasonable rate, the Court noted that Rutherford’s experts all made critical errors in applying it. For example, the Court found that Haire’s rate calculations were flawed because they were based on: (1) a miscalculation of the Telecom Plus formula’s carrying charge element; (2) a failure to divide maintenance expenses; (3) an erroneous use of a default rate of return instead of Rutherford’s actual rate of return; and (4) Haire’s failure to divide the cost of unusable space equally among all attachers. The Court found that when combined, these errors resulted in a 2012 rate that was nearly \$8.00 higher than the Telecom Plus rate would yield if properly

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applied and \$3.00 higher than what Rutherford actually charged TWEAN for that year. The Court also found Rutherford's expert Beacham's rate calculations similarly unpersuasive, given that her approach to space allocation required data on the number of entities on an average pole that Rutherford did not maintain.

The Business Court likewise found that Rutherford's expert Booth's rate analysis was flawed because his calculation that Rutherford's poles averaged only 10.83 feet of usable space was based not on actual data but instead on a series of flawed assumptions regarding the average height of Rutherford's poles, the average amount of space Rutherford uses on its poles, and the average number of third-party attachers per pole. The Court also rejected Booth's proposed allocation of 100 percent of the NESC-required safety space to TWEAN, which neither the FCC nor NRECA support and which the Court found would be unjust and unreasonable because Rutherford itself uses the safety space to generate revenue by installing streetlights. The Court further found that Booth's decision to allocate unusable space by dividing Rutherford's costs by only 1.45 attachers per pole after assigning the entire 40-inch safety space to TWEAN substantially increased TWEAN's rates but also contradicted his purported goal of equally allocating unusable space to each attacher, and was both unjust and unreasonable because "despite [Rutherford's] (and Bell South's) greater use of the pole and more valuable rights, Booth's rate methodology assigns a significantly greater portion of the pole costs (over 60 percent) to [TWEAN] than to any other party on the pole, including the pole owner."

The Business Court also rejected both Booth's TIER analysis, which it found was too faulty to be relied upon because it ignored Rutherford's actual practices and the terms of its attachment agreement with TWEAN, and Booth's argument that application of the FCC Cable Rate would result in a subsidy to TWEAN at the expense of Rutherford's members. In its findings, the Court noted that Booth's underlying assumption—that Rutherford only installs 40-foot poles to support attachments by TWEAN and other third-party attachers—was contradicted by: (1) testimony from Rutherford's other witnesses that it has used 40-foot poles as its standard pole size for the past 25 years, regardless of whether CSPs were present, to accommodate other electric utilities who as joint-users do not pay for their attachments; and (2) the terms of Rutherford's agreement with TWEAN, which explicitly require TWEAN to pay to install and make ready new, larger poles—which Rutherford takes ownership of while TWEAN continues to pay to attach—when additional space is needed for its attachments. Thus, contrary to Booth's claims,

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the Court found that the FCC Cable Rate “actually leaves the utility and its customers better off than they would be if no attachments were made to their poles” because the cable attacher “pays most of the incremental ‘but for’ costs of attachment up front, as well as its share of the fully allocated costs of pole ownership that necessarily would exist even absent its attachment.” In terms of subsidies, the Court found that if anything, in light of the agreement’s terms, they flowed the opposite direction because “[w]hen [TWEAN] pay[s] to create surplus space where it does not already exist, [Rutherford] benefits from receiving a taller, stronger pole that enhances [Rutherford’s] network, and TWEAN remain[s] obligated to pay annual rent to maintain an attachment to that pole.”

The Business Court also rejected Rutherford’s argument that its rates from 2010 to 2013 should be considered just, reasonable, and binding on TWEAN simply because other CSPs such as Charter Communications continued to pay them, especially in light of the evidence in the record that Charter only continued to pay due to its reluctance or inability to litigate the issue. As for Rutherford’s argument that applying the FCC Cable Rate would lead to an absurd result, given that Kravtin’s calculations for a just and reasonable rate yielded sums less than half of what TWEAN had voluntarily agreed to pay in 1998, the Court acknowledged “the disparity between the FCC Cable rates calculated by Kravtin and the IOU rates, on the one hand, and the rates charged by [Rutherford], on the other hand,” but nevertheless found that disparity “does not undercut the reasonableness of the former or justify the latter.”

Ultimately, the Business Court concluded that Rutherford’s pole attachment rates from 2010 through 2013 were not just and reasonable because they “greatly exceed the maximum just and reasonable pole attachment rates calculated under the FCC Cable Rate formula, and are not otherwise supported by the evidence and methodologies put forth by [Rutherford] and its experts.” While acknowledging that section 62-350 “does not limit the Court’s consideration [of whether a rate is just and reasonable] to only the [FCC] rules and regulations applicable under Section 224,” it nevertheless concluded that “on the record before the Court in this case, the FCC Cable Rate formula offered the most credible basis for measuring the reasonableness of [Rutherford’s] rates.” The Court further concluded that contrary to Rutherford’s interpretation of section 62-350’s use of the term “nondiscriminatory” to mean that its rates should be deemed reasonable because other third-party CSP attachers in the same class as TWEAN accepted them, the statute’s detailed provisions requiring EMCs to negotiate when requested “would be meaningless if [Rutherford] could dictate the rates and terms of

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attachment for every communications service provider once it reached an agreement with a single one.” After noting that our General Assembly could have expressly insulated class-based rates from review in individual cases but did not, the Court concluded that “other third-party attachers’ acceptance of [Rutherford’s] rates may be weighed as evidence . . . [but] will not foreclose [judicial] review under § 62-350.” Consequently, the Court also held that Rutherford violated section 62-350 by unilaterally increasing TWEAN’s rates without negotiation. Given the statute’s plain language and its detailed procedures for negotiating disputes between EMCs and CSPs, the Court concluded that

[t]he meaning of the statute is clear. [Rutherford] cannot subject a communications service provider to a rate without first negotiating and subsequently adopting a rate or litigating disputes. Although § 62-350 in no way bars the parties from reaching an agreement through negotiation that may contemplate annual rate increases, . . . the statute cannot be construed to allow [Rutherford] to do so without first negotiating with [TWEAN].

Finally, having found Rutherford’s rates for the years 2010 through 2013 unjust and unreasonable, the Business Court concluded pursuant to section 62-350 that “the parties must negotiate and adopt new rates” for those years, which “shall be applied retroactively to the date immediately following the expiration of the 90-day negotiating period for each year or the initiation of this lawsuit, whichever is earlier.” The Court specifically declined to assess any damages for TWEAN because doing so “would be, in effect, setting a new rate” which it declined to do out of concern for exceeding its judicial role. Instead, the Court ordered the parties to adopt new rates for 2010 through 2013 in accordance with the reasoning outlined in its order and opinion, and further ordered that, based on those new rates, Rutherford reimburse TWEAN for any amounts it overpaid between 2010 and 2012, and that TWC Southeast pay Rutherford the amount it owed based on the new rate adopted for 2013.

On 11 June 2014, Rutherford gave timely written notice of appeal to this Court.

II. Analysis

A. Rutherford’s rates from 2010-13 were not just or reasonable under section 62-350

[1] Rutherford first argues that the Business Court erred in its findings of fact and conclusion of law that the rates it charged TWEAN between

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2010 and 2013 were not just and reasonable under section 62-350. We disagree.

The standard of review on appeal from a judgment entered after a non-jury trial like the one the Business Court conducted in this matter is “whether there is competent evidence to support the [] court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment.” *Pegg v. Jones*, 187 N.C. App. 355, 358, 653 S.E.2d 229, 231 (2007) (citations and internal quotation marks omitted), *affirmed per curiam*, 362 N.C. 343, 661 S.E.2d 732 (2008). When the court’s factual findings are supported by competent evidence, they are considered conclusive, *see id.*, while “unchallenged findings of fact are presumed to be supported by competent evidence” and thus likewise binding on appeal. *Peltzer v. Peltzer*, __ N.C. App. __, __, 732 S.E.2d 357, 360, *disc. review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012). However, “it is well established that facts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light.” *42 East, LLC v. D.R. Horton, Inc.*, 218 N.C. App. 503, 518, 722 S.E.2d 1, 11 (2012) (citation and internal quotation marks omitted). Further, conclusions of law which are mischaracterized as findings of fact will be treated on review as conclusions of law. *See, e.g., Wiseman Mortuary, Inc. v. Burrell*, 185 N.C. App. 693, 697, 649 S.E.2d 439, 442 (2007); *see also In re Everette*, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999) (“As a general rule . . . any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified as a conclusion of law.”). A trial court’s conclusions of law are reviewed *de novo*, as are any questions of statutory interpretation. *See, e.g., Dare Cnty Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 588, 492 S.E.2d 369, 371 (1997).

In the present case, Rutherford does not specifically challenge any of the order and opinion’s factual findings, but instead contends that the order and opinion must be vacated in its entirety and the case remanded for a new trial because the Business Court misapprehended our General Assembly’s intent in enacting section 62-350 and therefore misinterpreted and misapplied its provisions, leading to an absurd result. Rutherford offers several arguments in support of its position that the Business Court erred in its interpretation of the statute, but none of them are meritorious.

(1) *The FCC Cable Rate was the only provision of Section 224 relied on at trial*

First, Rutherford argues that because the statute refers to “section 224 of the Communications Act of 1934,” which at the time of section

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62-350's enactment in 2009 included both the FCC Cable Rate and the FCC Telecom Rate, the Business Court erred by only considering the FCC Cable Rate to determine whether Rutherford's rates were just and reasonable. However, in light of the fact that none of Rutherford's experts relied on the FCC Telecom Rate for their calculations at trial, we consider this argument to be the judicial equivalent of a red herring. While Rutherford contends that its experts utilized formulas that share the FCC Telecom Rate's approach for allocating unusable pole space, the record before us indicates that the only evidence introduced at trial regarding the specific formulas found in section 224 of the Communications Act of 1934 was TWEAN's expert Kravtin's testimony based on the FCC Cable Rate. As such, this argument is without merit.

*(2) The Business Court did not presumptively adopt the
FCC Cable Rate*

Rutherford next argues that the Business Court erred by presumptively applying the FCC Cable Rate to determine whether its pole attachment rates were just and reasonable because the express language and legislative history of section 62-350 illustrate that our General Assembly did not intend to enact a federal standard of decision. In terms of legislative history, Rutherford emphasizes the fact that in deliberating how best to regulate pole attachment rates, our General Assembly considered statutory language that would have mandated the use of FCC rules and regulations for determining whether a rate is just and reasonable, but ultimately rejected that version of section 62-350 in favor of its current format. Rutherford further contends that, as enacted, section 62-350's reference to "section 224 of the Communications Act of 1934" was only intended to address the admissibility of otherwise irrelevant evidence regarding federal rate-setting methods while still preserving a state law standard of decision. Indeed, Rutherford points to the use of the phrase "including without limitation" to modify the statute's reference to section 224 as proof that the General Assembly never intended for the FCC Cable Rate to presumptively apply as the standard of decision for determining whether an EMC's rates are just and reasonable.

Instead, Rutherford argues that because section 62-350 includes the terms "just," "reasonable," and "nondiscriminatory"—which are all commonly used in North Carolina statutes and case law relating to activities legislatively determined to affect a public use—and because section 62-350 falls under our State's Public Utilities Act, our General Assembly clearly intended for the Business Court to utilize state law standards in assessing pole attachment rates. Rutherford contends this is significant because unlike the FCC Cable Rate, which offers a strictly cost-based

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approach, the state law standard the General Assembly intended requires additional consideration of other factors, including Rutherford's organizational structure and revenue requirements as an EMC and the costs it incurs by allowing attachments to its poles, as well as distinct evidentiary standards and presumptions. *See, e.g., State ex rel Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 348 N.C. 452, 467, 500 S.E.2d 693, 704 (1998); *State ex rel Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 351 N.C. 223, 245, 524 S.E.2d 10, 24 (2000). Specifically, Rutherford argues that under a state law standard: (1) the rates adopted by a legislatively designated rate-setting body are presumed to be just and reasonable; and (2) the inclusion of the term "nondiscriminatory" in section 62-350 obligates it to charge uniform class-based rates, which are judged based on their fairness to the class as a whole, rather than any specific individual member. *See, e.g., Carolina Water Serv., Inc. v. Pine Knoll Shores*, 145 N.C. App. 686, 689, 551 S.E.2d 558, 560, *disc. review denied*, 354 N.C. 360, 556 S.E.2d 298 (2001); *State ex rel Utils. Comm'n v. Boren Clay Products Co.*, 48 N.C. App. 263, 270-71, 269 S.E.2d 234, 239-41, *disc. review denied*, 301 N.C. 531, 273 S.E.2d 461 (1980); *State ex rel Corp. Comm'n v. Cannon Mfg. Co.*, 185 N.C. 17, 35, 116 S.E. 178, 189 (1923).

Proceeding from these premises, Rutherford contends that because other third-party attachers continued to pay its pole attachment rates during the years TWEAN refused, the rates should be presumed just and reasonable, and that the Business Court therefore erred in applying the FCC Cable Rate and rejecting the rate calculations proposed by Rutherford's experts based on its findings of fact, which Rutherford contends are mislabeled conclusions of law, that: (1) section 62-350's reference to section 224 indicates a "policy decision" by the General Assembly to require the use of federal standards and distinct cost apportionment methods associated with them; (2) the Court should "look[] first to the FCC's methods . . . given [section 62-350's] express instruction for the Court to consider the FCC approach outlined in Section 224;" and (3) the General Assembly "intended" that "reliance on established FCC precedent will . . . provide helpful guidance to parties involved in future negotiations over just and reasonable pole attachment rates, terms, and conditions."

We agree with Rutherford that section 62-350's legislative history and its use of the phrase "including without limitation" suggests that our General Assembly did not intend for the Business Court to rely solely on the FCC Cable Rate as its standard of decision for evaluating whether a pole attachment rate is just and reasonable. Indeed, we construe the

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plain language of section 62-350 to indicate a broadly inclusive approach to the types of evidence the Business Court should consider in analyzing pole attachment rates. However, Rutherford's argument that the Business Court presumptively adopted the FCC Cable Rate as its standard of decision fails because it relies on selective quotations from the order and opinion that distort and ignore the context of its holding. While certain findings of fact do suggest that the Business Court viewed the FCC Cable Rate's formula for allocating costs to attachers based on the proportion of usable pole space they occupy to be a more just and reasonable method of apportionment than those provided in the formulas Rutherford's experts relied on, the order and opinion makes clear that the Court's ultimate holding was based not on its preference for one formula over another but instead on the fact that—due to the significant errors Rutherford's experts made in calculating their proposed rates—the only competent evidence before the Court showed that the rates Rutherford charged TWEAN for the disputed years were neither just nor reasonable under the FCC Cable Rate. Stated slightly more succinctly: the problem for Rutherford was not that the Business Court refused to consider its evidence, but that it did not consider its evidence competent because the errors by Rutherford's witnesses Haire, Beacham, and Booth artificially inflated the pole attachment rates they testified would be just and reasonable. In short, the Business Court did not decide that Rutherford's witnesses were applying the wrong formulas; it concluded that they were applying them incorrectly. In the absence of any other competent evidence, it is unsurprising that the Business Court would rely on the FCC's methodology, which the express terms of section 62-350 indicate is admissible as at least some evidence of whether a pole attachment rate is just and reasonable. But that does not mean that in doing so the Business Court presumptively adopted the FCC Cable Rate as its standard of decision. Indeed, our review of the order and opinion demonstrates that, contrary to Rutherford's claims, the Business Court explicitly and repeatedly explained that its findings and conclusions were "based on the facts presented at trial in this case, and do[] not limit the Court from considering other methods of proving just and reasonable rates in future cases that may be brought under § 62-350." As such, we conclude that the Business Court did not adopt the FCC Cable Rate as a presumptive standard of decision, nor did it err in applying it here, absent any other competent evidence, to determine Rutherford's rates for the disputed years were not just and reasonable.

As noted *supra*, Rutherford also argues that the Business Court erred by disregarding the state law standard of decision it claims our

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General Assembly intended, including the presumption that its rates are just and reasonable as a legislatively designated rate-making body that is obligated to charge uniform rates based on the statute's inclusion of the term "nondiscriminatory." Rutherford further contends that, in light of case law indicating the fairness of a class-based rate should be measured on a class-wide basis, *see, e.g., Boren Clay Products Co.*, 48 N.C. App. at 270-71, 269 S.E.2d at 239-41, the Business Court should have presumed its rates were just and reasonable because other third-party attachers paid them. There are several reasons why these arguments fail.

On the one hand, we agree with the Business Court's conclusion that while another attacher's acceptance of Rutherford's uniform class-based rates may serve as some evidence those rates are just and reasonable, nothing in section 62-350 suggests that a rate should be presumed just and reasonable simply because it is uniform, or that the acceptance of such a rate by one attacher makes it just and reasonable as applied to all others, especially when, as here, the record demonstrates that although TWEAN was the only attacher to stop paying, others were clearly dissatisfied with Rutherford's rates but could not afford to litigate. Like the Business Court, we read the plain language and structure of the statute to indicate that Rutherford must negotiate with each CSP that so requests, and we likewise conclude that the detailed timelines for negotiations and procedures for judicial review provided under section 62-350 would be meaningless if Rutherford "could dictate the rates and terms of attachment for every [CSP] once it reached an agreement with a single one." We are similarly unpersuaded by Rutherford's argument that the Business Court erred because TWEAN failed to prove that the uniform class-based rates Rutherford charged were unreasonable on a class-wide basis, given that Rutherford failed to prove its rates were reasonable on any basis and nothing in the record indicates that either party's rate calculations depended on any information that was uniquely specific to TWEAN. Both parties relied on Rutherford's information to calculate the costs of its poles, and Rutherford's experts based their allocation of those costs to TWEAN on Rutherford's system-wide averages, while TWEAN applied the FCC Cable Rate's allocation formula based on the one foot of usable pole space its attachments occupy. Even assuming *arguendo* that Rutherford's other third-party CSP attachers might occupy slightly more or less space on its poles than TWEAN's attachments, we conclude that because those variations would be immaterial in light of the vast disparity between the maximum just and reasonable rate under the FCC Cable Rate and the rates Rutherford actually charged, this argument lacks merit.

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On the other hand, it is difficult to discern how any of the state law presumptions Rutherford refers to could apply in this case, given that Rutherford failed to present any competent evidence that its rates were just and reasonable. The Business Court's order and opinion provides detailed findings of fact explaining how the errors Rutherford's experts made in their calculations artificially inflated its rates and why the Court did not consider them. Those findings do not require the application of legal principles and are well supported in the record by competent evidence including each witness's testimony at trial. Moreover, Rutherford does not challenge any of them or offer any argument as to how or why the state law standards it insists the Business Court should have applied would excuse self-serving mathematical errors. Therefore, these factual findings are binding on appeal. *See Peltzer*, __ N.C. App. at __, 732 S.E.2d at 360; *Everette*, 133 N.C. App. at 85, 514 S.E.2d at 525. Again, the only competent evidence before the Business Court showed that Rutherford's rates were not just or reasonable under the FCC Cable Rate, and we conclude this was sufficient to rebut the state law standards and presumptions of reasonableness Rutherford claims should have applied, as there was simply nothing to which they could attach. We therefore further conclude that Rutherford's argument that the Business Court erred by failing to apply state law standards and presumptions lacks merit.

(3) *This result is not absurd*

Finally, Rutherford argues that the Business Court erred because its application of the FCC Cable Rate produced absurd results that could not have been intended by the General Assembly. While it is well established that our primary objective in construing a statute is to give effect to its legislative intent based on its plain meaning, when a literal reading of a statute "will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Freeland v. Orange Cnty.*, 273 N.C. 452, 456, 160 S.E.2d 282, 286 (1968).

Here, Rutherford contends the Business Court's application of the FCC Cable Rate produced absurd results with regard to both its rate levels and its aggregate pole attachment revenues. First, Rutherford complains that the Business Court's determination of its maximum just and reasonable per attachment rates of \$2.68 for 2010, \$2.56 for 2011, \$2.57 for 2012, and \$2.64 for 2013 are less than half of the per attachment rate of \$5.50 that TWEAN voluntarily paid in 1999. Rutherford further asserts, without citation to any evidence in the record, that our General Assembly surely could not have intended for section 62-350 to statutorily mandate a rollback of pole attachment rates. But Rutherford's bald

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assertion ignores this Court's prior holding that section 62-350 "endorses regulatory intervention to promote just and reasonable rates," *Town of Landis*, __ N.C. App. at __, 747 S.E.2d at 615, as well as the fact that before the statute's enactment in 2009, Rutherford and other EMCs were operating in what essentially amounted to an unregulated monopoly environment in which they were allowed to charge whatever exorbitant rate they wanted. We also note that Rutherford's argument mischaracterizes what the Business Court actually held. As its order and opinion makes clear, the Business Court explicitly declined to *set* a maximum just and reasonable pole attachment rate out of concern that doing so would exceed its judicial function. Instead, it held that Rutherford's rates for the years in dispute were not just or reasonable based on the only competent evidence in the record before it—TWEAN's expert Kravtin's testimony applying the FCC Cable Rate—and ordered the parties to "negotiate and adopt new rates" for the years in dispute. Thus, we conclude this argument is without merit.

Rutherford also complains that under the FCC Cable Rate, the maximum just and reasonable pole attachment rate it can charge as an EMC is far lower than the maximum rate the same formula could potentially generate for an IOU, which will result in a drastic reduction to its total revenues from pole attachments. By Rutherford's logic, this is an absurd result in part because Congress never intended for the FCC Cable Rate to apply to EMCs, which it exempted from federal regulation when it first enacted legislation to protect the then-fledgling cable industry from monopoly pole attachment rates charged by for-profit IOUs. Nevertheless, the Business Court provided detailed factual findings explaining that the FCC Cable Rate is widely lauded for its straightforward applicability to all types of utilities. Rutherford's related argument that our General Assembly never intended for the Business Court to presumptively adopt the FCC Cable Rate as its standard of decision fails for the same reasons already discussed *supra*. Moreover, as Rutherford concedes, the disparity in the maximum rates EMCs and IOUs can charge under the FCC Cable Rate is driven entirely by the disparities in their relative costs. As an EMC organized under Chapter 117 of our General Statutes, Rutherford's costs are far lower than a typical IOU's because it is exempt from paying income taxes and receives many other special advantages in order to better serve its core mission of helping to spread electricity to rural parts of our State.

Rutherford further protests that under the FCC Cable Rate its rates will be even lower relative to IOU rates because its rural service areas have a lower average number of attaching parties per pole than IOUs

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that serve more densely populated areas. Essentially then, Rutherford's argument amounts to a plea for more special advantages to make up for all the special advantages that it already gets, implying that otherwise its core mission could be jeopardized by the decline in its pole attachment revenues. Rutherford made similar arguments at trial, but the Business Court rejected them in detailed factual findings explaining that, rather than subsidizing TWEAN at Rutherford's members' expense, applying the FCC Cable Rate would still benefit Rutherford financially because the incidental costs of attachments are paid by the attachers who generate additional revenue for Rutherford by renting surplus pole space that would otherwise go unoccupied. Moreover, nothing in our review of the record indicates that Rutherford's continued financial stability is in any way dependent on its pole attachment rates or supports its insinuation that application of the FCC Cable Rate will endanger its core mission. Rutherford also argues that as an EMC, Chapter 117 of our General Statutes conveys vast discretion to its board of directors to act in the best interests of its member-owners. That may well be true, but section 62-350 demonstrates our General Assembly's intent to limit that discretion when it comes to charging pole attachment rates. While Rutherford's board of directors may no doubt be unhappy that it can no longer charge the same pole attachment rates it previously could in an unregulated monopoly environment, that alone does not mean the Business Court's narrow, detailed, and accurate application of section 62-350 produced an absurd result. We therefore conclude that this argument is without merit.

Accordingly, we hold that the Business Court did not err in concluding that Rutherford's rates for the disputed years were neither just nor reasonable under section 62-350.

B. Rutherford violated § 62-350 by unilaterally raising its rates without negotiation

[2] Rutherford also argues that the Business Court erred by concluding that it violated TWEAN's rights under section 62-350 when it unilaterally raised TWEAN's pole attachment rates without negotiation. Specifically, Rutherford contends that given the statute's inclusion of the term "nondiscriminatory," it is obligated to charge a uniform rate to all similarly situated third-party attachers, which means it was required to invoice TWEAN at the same rate it charged other CSPs, which continued to increase during the years in dispute. Therefore, Rutherford insists that it did not violate section 62-350 when it continued to unilaterally raise TWEAN's rates without negotiation and also complains that the

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Business Court's interpretation of the statute renders compliance virtually impossible. We disagree.

The plain language of section 62-350 requires a utility pole owner to allow CSPs to attach to its poles at "just, reasonable, and nondiscriminatory rates, terms, and conditions *adopted pursuant to negotiated or adjudicated agreements*," N.C. Gen. Stat. § 62-350(a) (emphasis added), and further provides procedures for negotiations upon a CSP's request and mechanisms for resolving disputes arising therefrom. *Id.* § 62-350(b)-(c). Thus, as the Business Court concluded in its order and opinion, "[t]he meaning of the statute is clear. [Rutherford] cannot subject a [CSP] to a rate without first negotiating and subsequently adopting a rate or litigating disputes."

Rutherford's protests to the contrary are wholly unpersuasive. On the one hand, Rutherford insists that as an EMC organized under Chapter 117 of our General Statutes, it is authorized to adopt uniform rates for similarly situated attachers, and that section 62-350 does not purport to extinguish that authority or transfer it to either the Business Court or an objecting attacher. But this argument conveniently ignores the statute's plain language, which requires Rutherford to negotiate when requested before charging rates that are not merely uniform but also just and reasonable. On the other hand, Rutherford worries that if an EMC with multiple CSPs attached to its poles must first negotiate with every attacher that so requests before adopting a rate, compliance with section 62-350's nondiscrimination requirement will be virtually impossible. We see no reason that would prevent a pole owner from adopting temporary rates subject to true-up while negotiating rates with multiple attachers at the same time and then subsequently adopting a uniform rate that is just and reasonable as to all of them.

Finally then, absent any credible argument why we should ignore the statute's plain language, we have no trouble concluding from the procedural history of this litigation that Rutherford violated section 62-350. The record before us clearly indicates that after the parties began negotiating pursuant to section 62-350, Rutherford unilaterally raised TWEAN's pole attachment rates each year and threatened to remove TWEAN's attachments from its poles if it refused to pay the increased rates. Rutherford attempts to argue that its actions did not violate section 62-350 because it only subjected TWEAN to invoices, but given Rutherford's failure to show that the rates reflected in these invoices were "adopted pursuant to negotiated or adjudicated agreements" as the statute's express terms require, *id.* § 62-350(a), this

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argument fails. Accordingly, we hold that the Business Court did not err in concluding that Rutherford violated section 62-350 when it unilaterally raised TWEAN's pole attachment rates without negotiation. Therefore, the Business Court's order and opinion is

AFFIRMED.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA
v.
GARY ANDERSON BARKER, JR., DEFENDANT

No. COA14-744

Filed 7 April 2015

1. False Pretense—indictment—misrepresentation—roof repairs

The Court of Appeals rejected defendant's argument that his indictments for obtaining property by false pretenses were facially invalid because they failed to "intelligibly articulate" defendant's misrepresentations. The indictments clearly stated that defendant told his elderly victims their roofs needed repairs when the roofs in fact did not need repairs.

2. False Pretense—sufficiency of the evidence—misrepresentation—roof repairs—incomplete or substandard work

In defendant's appeal of his convictions for obtaining property by false pretenses, the Court of Appeals rejected his argument that the trial court erred by denying his motion to dismiss. In the light most favorable to the State, the evidence showed that defendant falsely told his elderly victims that their roofs needed repairs and then took their money only to perform incomplete or substandard work.

3. False Pretense—jury instructions—specific misrepresentation and property—not required

In defendant's trial for obtaining property by false pretenses, the trial court did not err by failing to instruct the jury on the specific alleged misrepresentation made or the property received by defendant. The trial court properly gave the pattern jury instruction and was not required to specify the misrepresentation or property received. Even assuming error, there would be no plain error

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because the Court of Appeals has consistently found no error where a trial court has given the pattern jury instruction on obtaining property by false pretenses.

4. False Pretense—bad character evidence—post-arrest interview video

In defendant's trial for obtaining property by false pretenses, the trial court did not commit plain error by admitting a video recording of defendant's post-arrest interview with a police detective, which contained evidence of defendant's bad character. Defendant knew the contents of the video yet chose not to object—perhaps as part of his trial strategy—and he failed to meet his burden of showing that the trial court erred. Even assuming the trial court erred, in light of abundant other testimony that defendant actively sought to defraud elderly homeowners, defendant did not demonstrate prejudice.

5. False Pretense—bad character testimony—showed plan to defraud

In defendant's trial for obtaining property by false pretenses, the trial court did not err by admitting Rule 404(b) testimony from multiple witnesses tending to show that defendant actively sought to defraud elderly homeowners by falsely telling them their roofs needed repairs. This evidence was relevant for showing defendant's common plan, knowledge, intent, and lack of mistake, and the probative value outweighed the prejudicial effect. Furthermore, the trial court gave a limiting instruction to the jury.

Appeal by defendant from judgment entered 1 November 2013 by Judge W. Douglas Parsons in Orange County Superior Court. Heard in the Court of Appeals 6 January 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General David N. Kirkman, for the State.

Michele Goldman for defendant-appellant.

BRYANT, Judge.

Where an indictment for the offense of obtaining property by false pretenses alleges the ultimate facts of the offense, including the acts of misrepresentation, the indictment is not facially defective. The trial court did not commit error, plain or otherwise, in the admission of evidence, including evidence admitted under Rule 404(b).

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On 22 April 2013, defendant Gary Anderson Barker, Jr., was indicted on two counts of obtaining property by false pretenses and for being an habitual felon. The charges came on for trial during the 28 October session of Orange County Superior Court, the Honorable W. Douglas Parsons, Judge presiding. At trial, the evidence tended to show the following.

In May of 2010, defendant approached Nellie Harward at her home and told her that her roof needed repainting. Ms. Harward, who was eighty-five years old, was persuaded by defendant and paid him \$2,200.00 to repaint the metal roof of her home with black paint. Defendant also told Ms. Harward he would repair a shed in her backyard which housed her laundry equipment. Ms. Harward signed agreements with defendant for the work on her home and shed. Defendant worked on the roofing and siding of the shed, and rewired the shed. Ms. Harward paid defendant in two checks in the amount of \$3,400.00 and \$3,900.00, for a total of \$7,300.00, for the shed repairs.

Ms. Harward stated that as soon as it began to rain, the roof of her newly repaired shed began to leak and continued to do so each time it rained, damaging her new clothes dryer. Ms. Harward also stated that the black paint defendant had used on her roof quickly began to flake and peel off, causing leaks in the ceiling of her home. When Ms. Harward asked defendant to repair the roofs on her home and shed to stop the leaks, defendant claimed his repairs did not cause the leaks. After defendant refused to repair the leaking house and shed roofs, Dennis LaRue, a neighbor of Ms. Harward's, fixed the roof of her home and replaced her backyard shed. LaRue noted the shoddy work and substandard materials used by defendant and testified regarding them at trial. Ms. Harward ultimately paid \$8,000.00 to have her shed replaced in order to correct the "work" defendant performed on it.

Also, in May of 2010, Ms. Geraldine Hoenig was approached by defendant who claimed Ms. Hoenig's roof needed repair. After inspecting her roof, defendant told Ms. Hoenig she also needed to repair the roof decking on her home because the wood was rotten. Defendant told Ms. Hoenig that he could repair her roof for \$6,800.00 and her chimney for \$900.00. Ms. Hoenig borrowed \$4,000.00 from the bank to pay defendant. Then, defendant demanded she pay him an additional \$2,800.00 so he could special-order white shingles for her roof; Ms. Hoenig returned to her bank and borrowed these additional funds which she paid to defendant.

Defendant and his work crew began to work on Ms. Hoenig's roof, but after removing the shingles surrounding the roof's perimeter,

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defendant covered the exposed areas with roofing felt and did not return to complete the job. The roofing felt soon blew off of the roof, causing the roof to leak. When Ms. Hoenig called defendant, defendant claimed he could not finish her roof until the white shingles had arrived. Defendant then told Ms. Hoenig he would need another payment to complete the work, and when she told defendant she could only give him an additional \$200.00, defendant accepted the money. Defendant never returned to finish the roofing repairs for Ms. Hoenig.

A subsequent investigation revealed no sign of rotten wood on Ms. Hoenig's roof; rather, the damage observed appeared to have been recently caused by a hammer. It was also determined that defendant had not placed an order for white shingles, despite telling Ms. Hoenig that he had. Ms. Hoenig's roof was later repaired by another roofing company at no cost to her.

The State presented additional testimony by Bill Grice, Zona Norwood, and Helen Stinson. Mr. Grice testified that defendant had contracted with his late father, eighty-six-year-old William F. Grice, to repair his father's roof in May 2010. Mr. Grice stated that he had observed his father arguing with defendant because defendant wanted additional monies paid before he would finish the roof repairs. Mr. Grice further stated that his father's roof had to be replaced about three years later due to leaks caused by defendant's poor workmanship.

Ms. Norwood testified that she was approached by defendant in May of 2010 about needing repairs to the flashing on the chimney of her home where she had resided for forty-four years. Defendant offered to repair the flashing for \$40.00. After defendant went onto her roof to repair the chimney flashing, defendant told Ms. Norwood that her roof had significant damage all over it due to hail. Defendant urged Ms. Norwood to call her insurance company and that he would fix her roof for whatever price the insurance company would agree to. However, Ms. Norwood's insurance adjuster found no sign of hail damage to the roof. Another roofer whom Ms. Norwood called for a second opinion also found no evidence of hail damage, although he did notice that the repairs to the chimney flashing were not done properly. The second roofer also found what he determined to be evidence of intentional damage to Ms. Norwood's roof: a new nail had been partially driven into the roof just below the chimney, and the placement of the nail was such that it would cause the roof to leak. The second roofer repaired the damage to Ms. Norwood's roof for \$100.00.

Ms. Stinson testified that she was approached by defendant in September of 2009 about needing repairs to her roof. Ms. Stinson, who

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was seventy-eight years old, stated that after going onto her roof, defendant claimed that she needed her entire roof replaced. Ms. Stinson eventually paid defendant in three checks in the amount of \$425.00, \$1,600.00, and \$2,000.00, totaling \$4025.00, to have her roof repaired. However, after opening a large hole in her roof, defendant failed to fix the hole or finish repairing her roof. Defendant did not respond to Ms. Stinson's phone calls when she tried to reach him. Ms. Stinson had to pay another roofer \$3,000.00 to repair the hole in her roof.

The State presented during the trial a video-recording of defendant's post-arrest interview. During the interview defendant, when questioned about the repairs he performed for Ms. Harward and Ms. Hoenig, defended his workmanship and denied any wrongdoing.

On 1 November, a jury convicted defendant on two counts of obtaining property by false pretenses. Defendant plead guilty to the habitual felon charge. The trial court sentenced defendant to 96 to 125 months in prison, and ordered defendant to make restitution to Ms. Harward in the amount of \$7,300.00 and to Ms. Hoenig in the amount of \$7,000.00. Defendant appeals.

On appeal, defendant argues that (I) his indictments for obtaining property by false pretenses were facially invalid. Defendant further contends the trial court (II) committed plain error in admitting an exhibit, and (III) erred in admitting Rule 404(b) witness testimony.

I.

In his first argument, defendant sets forth three major contentions which we review separately based on the standard of review applicable to each.

Validity of Indictments

[1] Defendant contends his indictments alleging obtaining property by false pretenses were facially invalid because they failed to "intelligibly articulate" defendant's misrepresentations. We disagree.

"[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000) (citations omitted). "On appeal, we review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009) (citation omitted).

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“An indictment couched in the language of the statute is generally sufficient to charge the statutory offense. It is also generally true that indictments need only allege the ultimate facts constituting the elements of the criminal offense.” *State v. Singleton*, 85 N.C. App. 123, 126, 354 S.E.2d 259, 262 (1987) (citing *State v. Palmer*, 293 N.C. 633, 638, 239 S.E.2d 406, 410 (1977)).

Obtaining property by false pretenses is defined as (1) a false representation of a past or subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which the defendant obtains or attempts to obtain anything of value from another person [pursuant to N.C. Gen. Stat. § 14-100(a)]. A key element of the offense is that the representation be intentionally false and deceptive.

State v. Compton, 90 N.C. App. 101, 103, 367 S.E.2d 353, 354 (1988) (citations omitted).

The indictments challenged by defendant are as follows. Indictment 10 CRS 51390A, concerning Ms. Hoenig, alleged that

[t]he jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud obtain U.S. currency in the amount of \$7,000.00 from Geraldine Hoenig by means of a false pretense which was calculated to deceive and did deceive. This property was obtained by means of approaching the victim and claiming that her roof needed repair, and then overcharging the victim for either work that did not need to be done, or damage that was caused by the defendant, with no intention of providing professional services to the victim in return for the U.S. currency that he fraudulently acquired.

Indictment 10 CRS 51931A, concerning Ms. Harward, alleged that

[t]he jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud, obtain or attempt to obtain U.S. currency in the amount of \$7,300.00 from Nellie Harward by

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means of a false pretense which was calculated to deceive and did deceive. This property was obtained by means of approaching the victim and claiming that her shed roof needed repair, and at the time the defendant intended to use substandard materials and construction to overcharge the victim.

Defendant's argument that the indictments fail to articulate the misrepresentations committed by defendant lacks merit. The indictments clearly state that defendant, on separate occasions, obtained property (money) from Ms. Hoenig and Ms. Harward by convincing each victim to believe that their roofs needed extensive repairs when in fact their roofs were not in need of repair at all. In each indictment, the State gave the name of the victim, the monetary sum defendant took from each victim, and the false representation used by defendant to obtain the money: by defendant "approaching [Ms. Hoenig] and claiming that her roof needed repair, and then overcharging [Ms. Hoenig] for either work that did not need to be done, or damage that was caused by the defendant[.]" As to Ms. Harward, the false representation used by defendant to obtain the money was "by . . . claiming that her shed roof needed repair, [with defendant knowing] at the time [that he] intended to use substandard materials and construction to overcharge [Ms. Harward]." Each indictment charging defendant with obtaining property by false pretenses was facially valid, as each properly gave notice to defendant of all of the elements comprising the charge, including the element defendant primarily challenges: the alleged misrepresentation (i.e., that defendant sought to defraud his victims of money by claiming their roofs needed repair when in fact no repairs were needed, and that defendant initiated these repairs but either failed to complete them or used substandard materials in performing whatever work was done). *See State v. Cronin*, 299 N.C. 229, 238, 262 S.E.2d 277, 283 (1980) (holding that an indictment alleging the defendant had deceived a bank through false representations was facially sufficient, because "[i]f the false pretense caused the victim to give up his property, it logically follows that the property was given up because the victim was in fact deceived by the false pretense."). Defendant's challenge to the indictments as facially invalid is, therefore, overruled.

Sufficiency of the Evidence

[2] Defendant further argues that even if the indictments were facially valid, the State did not meet its evidentiary burden of proof. Specifically, defendant contends the State's evidence only showed that defendant

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“charged a lot for poor quality work,” rather than demonstrating that defendant “obtained the property alleged by means of a misrepresentation,” and that as a result, the trial court erred in denying defendant’s motion to dismiss.

In order to justify the denial of a motion to dismiss for insufficient evidence, the State must present substantial evidence of (1) each essential element of the [charged offense] and (2) defendant’s being the perpetrator of such offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. On appeal, we view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. We review a trial court’s decision to deny a motion to dismiss for insufficient evidence *de novo*.

State v. Privette, 218 N.C. App. 459, 470-71, 721 S.E.2d 299, 308-09 (2012) (citations and quotations omitted).

The gist of obtaining property by false pretense is the false representation of a . . . fact intended to and which does deceive one from whom property is obtained. The [S]tate must prove, as an essential element of the crime, that defendant made the misrepresentation as alleged. If the [S]tate’s evidence fails to establish that defendant made this misrepresentation but tends to show some other misrepresentation was made, then the [S]tate’s proof varies fatally from the indictments.

State v. Linker, 309 N.C. 612, 614-15, 308 S.E.2d 309, 310-11 (1983) (citations omitted).

The State presented evidence through the testimony of Ms. Harward and Ms. Hoenig. Each testified that defendant approached them at their respective homes by claiming he had noticed roof damage on their homes while driving through their neighborhood. Each of them gave defendant money, \$7,300.00 and \$7,000.00, respectively, based on his representation that repairs were needed. Ms. Hoenig discussed how defendant initially claimed only a small repair to her roof was needed, before inspecting the roof and claiming that significant repairs were needed. Ms. Hoenig stated that although defendant began to repair her roof by removing several rows of shingles, defendant then abandoned the job; Ms. Hoenig was forced to call another roofer to repair the damage after her partially unshingled roof began to leak.

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Ms. Harward testified that after she asked defendant to simply “nail down” part of her shed’s roofing, defendant claimed the shed’s entire roof needed to be replaced. After the shed’s roof was replaced, Ms. Harward stated that the roof began to leak immediately, damaging her clothes dryer; defendant’s substandard repairs required Ms. Harward to purchase a new shed.

We disagree with defendant that such evidence was insufficient to support the charges of obtaining property by false pretenses. Rather, this evidence demonstrates that defendant deliberately targeted Ms. Harward and Ms. Hoenig, two elderly women, for the purpose of defrauding each of them by claiming their roofs needed significant repairs when, as the State’s evidence showed, neither woman’s roof needed repair at all. The State presented additional evidence which tended to show that within the same general timeframe, defendant had targeted other elderly individuals as well, each time approaching the individual at his or her home and claiming that their roof needed a small repair. Upon inspecting the roof, defendant would then claim the roof needed more significant (and costly) repairs. In each instance, defendant would either begin but never complete the roof repair, or would do a substandard job on the repair. Such evidence was more than sufficient to sustain the charges of obtaining property by false pretense against defendant, as the evidence demonstrated that defendant deliberately targeted elderly individuals for the purpose of defrauding those persons based on false roof repair claims.

Defendant also attempts to support his argument by contending that even if the State presented evidence of a false representation by defendant, such evidence would constitute a fatal variance because the \$7,000.00 obtained from Ms. Hoenig and the \$7,300.00 obtained from Ms. Harward “was not the subject of any purported misrepresentation.” Rather, defendant asserts he “legitimately earned at least some portion” of each amount and, as such, the indictments were defective. Defendant’s argument lacks merit for, as already discussed, the indictments were facially sufficient as to what property defendant obtained from his victims by means of false representations. Moreover, although defendant claims he “legitimately earned at least some portion” of the \$7,300.00 Ms. Harward paid him for other home repair services, a review of the trial transcript indicates that Ms. Harward paid this sum to defendant solely for defendant’s “work” on her shed, a shed which had to be replaced with an entirely new structure due to the damage caused by defendant. Likewise, Ms. Hoenig’s payment of \$7,000.00 to defendant was solely for her roof to be repaired, and these “repairs” consisted of defendant removing three rows of shingles from the edge of her roof

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and then abandoning the job, causing the roof to leak and forcing Ms. Hoenig to contact another roofer to fix the damage. Defendant's contention that the indictments were defective because he "legitimately earned at least some portion" of these monies is without any merit, as the evidence indicated that for each victim, defendant engaged in work which caused significant damage to each victim's property, causing each victim to expend resources of time and/or money to complete work that was never finished or repair damage based on the shoddy work performed by defendant. Viewed in the light most favorable to the State, the evidence was sufficient for a jury to find defendant made a false representation to each of his victims and committed the crime of obtaining property by false pretenses. Defendant's challenge to the trial court's denial of his motion to dismiss is overruled.

Jury Instructions

[3] Defendant next argues that even if the indictments were sufficient, the trial court erred in its jury instructions because the trial court failed to specify the misrepresentation made by defendant or the property defendant received. First, and perhaps most importantly, defendant failed to object to the trial court's jury instructions. Therefore, this issue must be reviewed for plain error. *See State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citation omitted).

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Id. at 516-17, 723 S.E.2d at 334 (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). However, "even when the 'plain error' rule is applied, [i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Id.* at 517, 723 S.E.2d at 333-34 (citations and quotation omitted).

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During the charge conference, defendant did not object to the trial court's proposed instructions, nor did defendant object during or after the trial court gave the following pertinent instructions to the jury:

The defendant has been charged with two counts of obtaining property by false pretenses. For you to find the defendant guilty of each of these offenses, the State must prove five things beyond a reasonable doubt in each count: First, that the defendant made a representation to another about a past or subsisting fact or of a future fulfillment or event; second, that this representation was false; third, that this representation was calculated and intended to deceive; fourth, that the victim was in fact deceived by this representation; and fifth, that the defendant obtained or attempted to obtain property from the victim.

In 10 CRS 5193A, if you find from the evidence beyond a reasonable doubt that on or about May 1, 2010, to June 1, 2010, the defendant made a representation to Geraldine Hoenig about a past or subsisting fact or of a future fulfillment or event and that this representation was false, that this reputation was calculated and intended to deceive, that Geraldine Hoenig was in fact deceived by it, and that the defendant thereby obtained property from Geraldine Hoenig, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

In 10 CRS 51931A, if you find from the evidence beyond a reasonable doubt that on or about May 1, 2010, to June 1, 2010, the defendant made a representation to Nellie Harward about a past or subsisting fact or of a future fulfillment or event and that this representation was false, that this representation was calculated and intended to deceive, that Nellie Harward was in fact deceived by it, and that the defendant thereby obtained or attempted to obtain property from Nellie Harward, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

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Defendant's contention that the trial court erred in its jury instructions is without merit, as the trial court properly instructed the jury using the pattern jury instruction for the offense of obtaining property by false pretenses. *See* N.C. Gen. Stat. § 14-100 (2013); N.C.P.I–Crim. 219.10 (2013). Defendant cites cases indicating the specificity required of an *indictment* alleging obtaining property by false pretenses, and the proof the State is required to put forth, including the representation alleged in the indictment. However, defendant also acknowledges, albeit while trying to distinguish it, a case where this Court noted that the trial court was not required to instruct the jury on a specific misrepresentation in the indictment alleging obtaining property by false pretenses. *See State v. Ledwell*, 171 N.C. App. 314, 320, 614 S.E.2d 562, 566 (2005) (“A jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the court finds ‘no fatal variance between the indictment, the proof presented at trial, and the instructions to the jury.’” (quoting *State v. Clemmons*, 111 N.C. App. 569, 578, 433 S.E.2d 748, 753 (1993))). Therefore, we can find no error in the trial court's instructions in the instant case.

However, even assuming *arguendo* the trial court's instructions were erroneous, we would still find no plain error as this Court has consistently found no plain error where a trial court has given the pattern jury instruction for the offense of obtaining property by false pretenses. *See State v. Grier*, 35 N.C. App. 119, 121, 239 S.E.2d 870, 871 (1978) (no plain error where the trial court charged the jury according to the pattern jury instruction for obtaining property by false pretenses). As such, the trial court did not commit error, much less plain error, in its jury instructions for the offense of obtaining property by false pretenses. Defendant's argument is, therefore, overruled.

II.

[4] Defendant next contends the trial court committed plain error in admitting an exhibit, a videotaped interview of defendant after his arrest. We disagree.

As defendant lodged no objection to the videotape when it was introduced into evidence and played for the jury, defendant's challenge on appeal can only be based on plain error. And, as we noted in *Issue I*, plain error is to be applied cautiously, and only in exceptional cases. Defendant bears the burden of establishing that the error he alleges is a fundamental error, prejudicial to him, that had a probable impact on the jury's verdict. *See Lawrence*, 365 N.C. at 516-17, 723 S.E.2d at 333-34. On the facts of this case, defendant is unable to meet his burden.

STATE v. BARKER

[240 N.C. App. 224 (2015)]

Defendant argues that the trial court committed plain error when it admitted into evidence, without objection by defendant, a videotaped recording of his post-arrest interview with Detective Attack. Nevertheless, defendant now contends the admission of the video recording was highly prejudicial because the recording contained evidence regarding defendant's prior criminal history, drug use, and "habit of frequenting strip clubs[,] and that this evidence of defendant's bad character violated Rule 404(b). Defendant's argument is unavailing though, because defendant knew the contents of the video, including those parts he now challenges, yet he chose not to object to the video, either in its entirety or any portion of it, at trial. Under our adversarial system, parties must present their evidence and arguments at trial, and "have an obligation to raise objections to errors at the trial level. Any other approach would place an undue if not impossible burden on the trial judge." *Id.* at 512, 723 S.E.2d at 330 (citations and quotation omitted). Perhaps as a trial strategy, since he did not testify, defendant chose not to object and was able to use the video to assert an alibi defense, to describe events and interactions with the victims, including specific denials of wrongdoing, and to point to someone else as being responsible for the shoddy work alleged. Notwithstanding defendant's reasons for not objecting at trial, here, on appeal, he is unable to show that the trial court erred in admitting the videotape and its contents as evidence.

Further, even if we were to assume (which we refuse to do) that the admission of the video recording was error, defendant has not demonstrated prejudice from its admission. The State put forth witness testimony of Ms. Harward and Ms. Hoenig, the two victims alleged in the indictments, as well as Rule 404(b) witness testimony by four other individuals who had been subjected to defendant's fraudulent roof repair scheme. The videotape of defendant's interview was admitted into evidence only after six witnesses and Detective Attack had testified. As the testimony was both consistent and compelling in demonstrating that defendant actively sought to defraud elderly homeowners by claiming their homes needed roof repairs when, in fact, no such repairs were needed, it is not probable that the jury could have reached a different verdict had the trial court not admitted the videotaped interview. Accordingly, defendant's argument is overruled.

III.

[5] Finally, defendant argues that the trial court erred in admitting Rule 404(b) witness testimony. We disagree.

"[W]e . . . review the admission of . . . 404(b) testimony de novo." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

STATE v. BARKER

[240 N.C. App. 224 (2015)]

While “[e]vidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion,” such evidence may be “admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.” N.C. Gen. Stat. § 8C-1, Rule 404(a), (b) (2013). We use a three-part test to determine whether evidence was properly admitted under Rule 404(b):

First, is the evidence relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried? Second, is that purpose relevant to an issue material to the pending case? Third, is the probative value of the evidence substantially outweighed by the danger of unfair prejudice pursuant to Rule 403?

State v. Foust, 220 N.C. App. 63, 69, 724 S.E.2d 154, 159 (2012).

The State put on three Rule 404(b) witnesses: Mr. Grice, Jr., Ms. Norwood, and Ms. Stinson. Mr. Grice testified about his elderly father’s experience with defendant, while Ms. Norwood and Ms. Stinson testified about their personal experiences with defendant. Each witness offered evidence which tended to show that defendant had deliberately targeted elderly individuals by approaching them at their homes and claiming their roofs needed repair. More specifically, the Rule 404(b) evidence was offered to show, and indeed demonstrated, that defendant acted according to a common plan or scheme, as well as showing knowledge, intent, and lack of mistake. The trial court in fact analyzed the Rule 404(b) evidence and found it to be relevant for a purpose other than propensity, and that it was admissible and relevant to plan, knowledge, and lack of mistake. The trial court then conducted a balancing test, finding that the probative value of the evidence outweighed the prejudicial effect. From our review, it appears the evidence was properly admitted under Rule 404(b).

The evidence defendant challenges shows that defendant would stop and approach an elderly victim at his or her house and claim that the victim needed minor roof repairs (defendant often claimed a few shingles were loose, and that this problem could be immediately fixed for about \$40.00). After defendant or defendant’s assistant would go onto the roof to “inspect” it, defendant would then claim that the roof needed extensive repairs and request immediate payment before those repairs could begin. After receiving payment, defendant would do some

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work on the roof (which consisted of defendant removing roofing materials, such as shingles), before demanding additional money to complete the repair. In some instances, defendant would “complete” the repair, only to tell the victim the repair was fine when, in fact, the victim’s roof was seriously leaking; in other instances, defendant would abandon the repair job entirely.

This evidence was properly admitted under Rule 404(b) because it demonstrated that defendant specifically targeted his victims pursuant to his plan and intent to deceive, and with knowledge and absence of mistake as to his actions. Further, the trial court gave limiting instructions to the jury as to the proper use of this evidence when the evidence was initially received, and again during the final jury charge. Accordingly, defendant’s argument is overruled.

We find no error in the judgment of the trial court.

NO ERROR.

Judges STROUD and HUNTER, Jr., concur.

STATE OF NORTH CAROLINA
v.
CHARLES GILBERT GILLESPIE

No. COA14-953

Filed 7 April 2015

1. Constitutional Law—effective assistance of counsel—failure to object

A defendant in an assault inflicting serious injury by strangulation, second degree kidnapping, and second degree sexual offense case did not receive ineffective assistance of counsel because his trial counsel’s failure to object to the officer’s testimony and failure to object to the striking of the defense witness’s testimony did not prejudice him.

2. Criminal Law—clerical error—remanded for correction

A clerical error on the Additional File No.(s) and Offense(s) form attached to the judgment, which did not affect defendant’s sentences for the charges of assault inflicting serious injury by

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strangulation; second degree kidnapping; and second degree sexual offense, was remanded for correction of the clerical error in the judgment.

Appeal by defendant from judgment entered 31 October 2013 by Judge Hugh B. Lewis in Rowan County Superior Court. Heard in the Court of Appeals 4 February 2015.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for the State.

Kevin P. Bradley for defendant-appellant.

DIETZ, Judge.

Defendant Charles Gilbert Gillespie appeals from convictions stemming from a brutal attack and sexual assault on a female victim. Gillespie repeatedly punched the victim in the face, threatened her with a kitchen knife, forced her to submit to anal sex, and choked her when she attempted to fight him off. A jury convicted Gillespie of assault inflicting serious injury by strangulation, second degree kidnapping, and second degree sexual offense. The trial court sentenced him to 146-185 months in prison.

On appeal, Gillespie argues that it was either plain error or ineffective assistance of counsel for the trial court to admit without objection the testimony of a law enforcement officer who described the victim's demeanor. He also argues that it was either plain error or ineffective assistance of counsel for the trial court to strike without objection the testimony of a defense witness who stated that the alleged crimes "just don't fit [Gillespie's] M.O." Finally, Gillespie argues that his sentence should be vacated and remanded because the judgment form mistakenly lists a conviction for assault with a deadly weapon, a charge of which he was acquitted.

For the reasons set forth below, we hold that Gillespie did not receive ineffective assistance of counsel because his trial counsel's failure to object to the officer's testimony and failure to object to the striking of the defense witness's testimony did not prejudice him. We likewise hold that the trial court's admission and striking of that testimony did not constitute plain error. Because there is a clerical error on the "Additional File No.(s) and Offense(s)" form attached to the judgment—which did not affect Gillespie's sentence—we remand for correction of the clerical error in the judgment.

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Facts and Procedural History

Gillespie and Jane Doe¹ had known each other since around 1994 or 1995 and previously had a consensual sexual relationship. On 16 May 2011, Ms. Doe's neighbor gave Ms. Doe and Gillespie a ride to the grocery store to buy food and beer. Gillespie and Ms. Doe then returned to her apartment where they drank the beer. Ms. Doe testified that Gillespie became angry when he realized that there was no more beer in the refrigerator. He told her that he was going to "f— [her] in [her] a—" and began "punching" and "smacking" her in the face. Ms. Doe attempted to get away from Gillespie by running into the bathroom. She got in the shower to clean the blood off of her face. Gillespie followed her into the bathroom, pulled the shower curtain back, and made her take a shower while he watched.

When Ms. Doe finished showering and left the bathroom wearing only a towel, she saw Gillespie "come walking towards [her] with three knives, like a butcher knife and two small steak knives." He said, "Don't think I won't do it to you." Ms. Doe ran back into the bathroom and locked the door, but Gillespie broke through the door. Once inside the bathroom, Gillespie again hit Ms. Doe.

Gillespie then put the knives away and took Ms. Doe into the bedroom. Gillespie told her to take her towel off and get on the bed. She complied because she was "scared for [her] life." Gillespie got cocoa butter and baby oil from the bathroom and rubbed them on his penis. He then started having anal sex with Ms. Doe against her will. She "told him to stop," that "he was hurting [her]," but he told her to "shut up." Ms. Doe kicked him in the chest to get him off of her, but he pulled her onto the floor and started choking and hitting her. When Gillespie was choking her, Ms. Doe was unable to breathe and felt "[l]ike [she] was going to die."

Gillespie eventually left the bedroom and Ms. Doe quickly put some clothes on and ran next door to her neighbor's apartment. Ms. Doe had blood on her face and arms, a swollen eye, and a hurt ankle. The neighbor called 911. The neighbor testified that Ms. Doe was "really upset" and "shaking," and said Ms. Doe told her that Gillespie had sexually assaulted her, trapped her in the bathroom, and "beat on her." Throughout the evening, the neighbor had heard "a lot of banging" coming from Ms. Doe's apartment.

1. We use a pseudonym to protect the victim's privacy.

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Rowan County Sheriff's Deputy Timothy Cook responded to the 911 call. He discovered Ms. Doe sitting in front of her neighbor's apartment and complaining that she thought she had a broken ankle. Deputy Cook observed that Ms. Doe had bruises on her body and was very upset. Ms. Doe told Deputy Cook that her boyfriend had beaten her up. Deputy Cook searched Ms. Doe's apartment, but did not find Gillespie. Ms. Doe did not tell Deputy Cook that Gillespie had sexually assaulted her. Ms. Doe testified that she did not tell Deputy Cook about the sexual assault because she "didn't like that cop" and "[h]e was real rude, like I was faking or something." Deputy Cook called EMS and Ms. Doe was taken to the hospital by ambulance. Ms. Doe was treated for her injuries at the hospital, but testified that she did not tell hospital personnel about the sexual assault because she was embarrassed and ashamed.

When Ms. Doe's mother picked her up from the hospital, she told her mother what had happened, including that Gillespie had forced her to have anal sex with him against her will. Ms. Doe and her mother went to the Rowan County Sheriff's Office and met with Deputy J.R. Wietbrock. Ms. Doe told Deputy Wietbrock what had happened, including the sexual assault, and then made a written statement.

Gillespie was charged as a habitual felon with first degree sexual offense, first degree kidnapping, assault by strangulation, and assault with a deadly weapon. The case went to trial on 29 October 2013. At trial, the State asked Deputy Wietbrock to compare Ms. Doe's demeanor during her initial police statement and during her trial testimony. Deputy Wietbrock testified:

That day she was – I would say that she was more scared and, you know, wanted to let me know everything that had happened. Today she's, in my opinion, trying to remember things that have happened, and she's not scared or anything today or upset like she was.

Gillespie's counsel did not object to this testimony.

Wilbert Horton, Jr., an acquaintance of Gillespie, testified on Gillespie's behalf. Horton testified that he did not believe his friend Gillespie had committed the acts charged. When the State asked Horton why he believed "this is something that I don't think [Gillespie] could do," Horton testified that the charged offenses "just don't fit [Gillespie's] M.O." The State then requested a *voir dire* examination with Horton outside the presence of the jury. During this *voir dire*, the State questioned Horton about his knowledge of Gillespie's prior convictions, including multiple prior assault convictions. Gillespie's counsel objected to the

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cross-examination of Horton regarding Gillespie's prior convictions. In response, the trial court sustained the objection to cross-examination, but also struck some of Horton's testimony, instructing the jury that

[T]here were statements made by this witness that "this is something I don't think he could do," referring to the defendant, "this is not part of his M.O.," and other statements such as that. . . . Any statements by this individual as to his opinion of whether or not the defendant could or could not have done these acts that are at issue in this trial are not to be considered by you in any form or fashion during your deliberation.

Gillespie's counsel did not object to the striking of Horton's opinion.

The jury convicted Gillespie of second degree sexual offense, second degree kidnapping, and assault by strangulation, but acquitted him of assault with a deadly weapon. He then entered a plea agreement, acknowledged by the trial court at sentencing, that provided that his three convictions would be consolidated into one sentence for second degree sexual offense, a Class C felony. However, the "Additional File No.(s) and Offense(s)" form attached to the judgment erroneously indicated that "Assault with a Deadly Weapon" was a charge for which Gillespie had been convicted. Gillespie did not seek to correct this error in the trial court. He then appealed his conviction and sentence to this Court.

Analysis**I. Admission and Striking of Witness Testimony**

[1] Gillespie first argues that it was either plain error or ineffective assistance of counsel for the trial court to admit, and for defense counsel to fail to object to, testimony from Rowan County Sheriff's Deputy J.R. Wietbrock regarding the victim's demeanor during her initial police statement and during her trial testimony. We reject this argument because Gillespie cannot show a reasonable probability that absent the alleged error, the jury would have reached a different result—the strict prejudice standard applicable to these claims.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (internal quotation marks omitted).

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Plain error should be “applied cautiously and only in the exceptional case” where the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.*

Similarly, to show ineffective assistance of counsel, a defendant must show both that “counsel’s performance was deficient” and that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). “[I]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, [this Court] need not determine whether counsel’s performance was deficient.” *State v. Phillips*, 365 N.C. 103, 122, 711 S.E.2d 122, 138 (2011) (internal quotation marks omitted).

Gillespie contends that it was error for the court to allow, and for his counsel not to object to, testimony given by Deputy Wietbrock comparing the victim’s demeanor during her police statement and during her trial testimony. The State asked Wietbrock to describe how Ms. Doe’s demeanor during her initial police statement was different from her demeanor during her trial testimony. Wietbrock responded:

That day she was – I would say that she was more scared and, you know, wanted to let me know everything that had happened. Today she’s, in my opinion, trying to remember things that have happened, and she’s not scared or anything today or upset like she was.

Gillespie asserts that these statements are inadmissible opinion testimony because Wietbrock “vouched for the veracity of [Ms. Doe’s] claims.” See N.C. Gen. Stat. § 8C-1, Rule 701 (2013); *State v. Gobal*, 186 N.C. App. 308, 318, 651 S.E.2d 279, 286 (2007). He argues that, because “this case turned on the credibility of the victim,” Wietbrock’s statements “must have had an impact on the jury’s determination whether [Ms. Doe] was remembering or fabricating her accounts of Gillespie sexually assaulting, restraining, and strangling her.”

We disagree. Ms. Doe’s testimony was supported by the testimony of her neighbor and Ms. Doe’s mother. The testimony of those witnesses was not refuted at trial. Thus, Gillespie has not met his burden of showing that, absent Deputy Wietbrock’s purportedly inadmissible testimony, the jury probably would have reached a different result.

Gillespie contends that this case is analogous to *State v. Towe*, where an expert witness made a “conclusory assertion that the victim

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had been sexually abused,” based only on the victim’s statements. 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). Our Supreme Court found that the admission of this expert testimony constituted plain error because it “impermissibly bolstered the victim’s credibility” where the “case turned on the credibility of the victim, who provided the only direct evidence against defendant.” *Id.* at 62-63, 732 S.E.2d at 568. But *Towe* is readily distinguishable. There, the only testimony supporting the alleged abuse came from the victim herself. Here, by contrast, there were multiple other sources of evidence that corroborated the victim’s testimony, including the testimony of her neighbor and her mother. Accordingly, we reject this argument.

Gillespie next argues that it was either plain error or ineffective assistance of counsel for the trial court to strike, and for defense counsel to fail to object to the striking of, testimony from defense witness Wilbert Horton, Jr., regarding Gillespie’s character. Again, we must reject this argument under the applicable standard of review.

After Horton testified that he did not believe Gillespie could have committed the crimes charged and that “it just – that just don’t fit his M.O.,” the State sought to introduce evidence of Gillespie’s prior convictions for assault. The trial court denied that request but instructed “the jury that they are to disregard the opinion of whether or not this individual could have done this or it’s in his M.O.”

Gillespie has not shown that, had the trial court not instructed the jury to disregard these portions of Horton’s testimony, the jury probably would have reached a different result. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334; *Strickland*, 466 U.S. at 694. Gillespie does not offer any reason why the opinion of a friend of Gillespie would have made it likely that the jury would discredit the compelling testimony of the victim, the victim’s mother, and the victim’s neighbor. Accordingly, we reject Gillespie’s argument and find no plain error or ineffective assistance of counsel at trial.

II. Error on Judgment Form

[2] Gillespie next argues that the judgment should be vacated and remanded for resentencing because the “Additional File No.(s) and Offense(s)” form attached to the judgment erroneously lists “Assault with a Deadly Weapon,” a charge of which Gillespie was acquitted. He contends that this error renders his sentence “invalid as a matter of law” and that the judgment must be vacated because “the Superior Court did not specify which convictions were considered in pronouncing the consolidated judgment.” We reject this argument because the record

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unquestionably indicates that Gillespie was sentenced only for crimes he actually was convicted of committing, and the inclusion of the assault with a deadly weapon charge was a clerical error.

Here, Gillespie entered into a sentencing agreement with the State in which he admitted habitual felon status in exchange for his three convictions being consolidated into one sentence for second degree sexual offense, a Class C felony. That plea agreement expressly included only his three actual convictions, for second degree sexual offense, second degree kidnapping, and assault by strangulation. It did not include the charge of assault with a deadly weapon, for which he was not convicted. At sentencing, the trial court expressly referenced the plea agreement and described its terms, leaving no doubt that the trial court did not believe Gillespie had been convicted of assault with a deadly weapon, and leaving no doubt that Gillespie's sentence was not affected by that acquitted charge.

Gillespie relies on *State v. Moore* for the proposition that a consolidated judgment must be remanded for resentencing where the reviewing court is "unable to determine what weight, if any, the trial court gave each of the separate convictions . . . in calculating the sentences imposed upon the defendant." 327 N.C. 378, 383, 395 S.E.2d 124, 127-28 (1990). But in *Moore*, one of the offenses the trial court considered at sentencing was improper and should not have been considered. Here, by contrast, we know that the trial court never considered the assault with a deadly weapon charge at sentencing because Gillespie was sentenced under a plea agreement that only included the three crimes he actually was convicted of committing. Accordingly, *Moore* is readily distinguishable.

Although the mistaken reference to "Assault with a Deadly Weapon" on an attachment to the judgment form did not affect Gillespie's sentence, that clerical error still must be corrected. A "clerical error" is defined as "[a]n error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand for correction because of the importance that the record 'speak the truth.'" *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008).

This Court has held that an error on a judgment form which does not affect the sentence imposed is a clerical error, warranting remand for correction but not requiring resentencing. *State v. Roberts*, ___ N.C.

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App. ___, ___, 767 S.E.2d 543, 556 (2014); *Smith*, 188 N.C. App. at 845, 656 S.E.2d at 696-97; *see also State v. Llamas-Hernandez*, 189 N.C. App. 640, 655, 659 S.E.2d 79, 88 (2008) (Steelman, J., dissenting), *rev'd per curiam for reasons stated in dissenting opinion*, 363 N.C. 8, 673 S.E.2d 658 (2009) (noting that where the error had no effect on the sentence received, “it would be unnecessary to resentence defendant”). Accordingly, we hold that Gillespie is not entitled to resentencing, but we remand the judgment to the trial court to correct the clerical error on the “Additional File No.(s) and Offense(s)” form by removing the reference to “Assault with a Deadly Weapon.”

Conclusion

For the reasons discussed above, we conclude that Gillespie did not receive ineffective assistance of counsel and the trial court did not commit plain error in admitting or striking various witness testimony in this case. Because Gillespie was sentenced in accordance with his agreement with the State, which included only those offenses he was actually convicted of committing, there is no need for resentencing. The trial court’s judgment remains undisturbed, but we remand for the limited purpose of correcting the clerical error described above.

NO PLAIN ERROR IN PART; NO ERROR IN PART; REMANDED IN PART.

Judges STEELMAN and INMAN concur.

STATE OF NORTH CAROLINA
v.
SHANNON JEROME MITCHELL

No. COA14-1228

Filed 7 April 2015

1. Evidence—witness testimony—defendant’s incriminating statements prior to crime—relevancy—state of mind—premeditation—deliberation

The trial court did not abuse its discretion in a first-degree murder case by allowing witnesses to testify that defendant made statements before the shooting that he had come to town that day to shoot someone to get the keys to his grandmother’s car. The statements illustrated defendant’s state of mind near the time of the

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shooting, which was relevant to the charge of first-degree murder under the theory of premeditation and deliberation.

2. Confessions and Incriminating Statements—recording of jailhouse call

The trial court did not abuse its discretion in a first-degree murder case by admitting into evidence the recording of the jailhouse telephone call defendant placed to his father. It was direct evidence showing defendant shot the victim and he knew it. It was particularly probative in light of defendant's defense that his actions were a result of his diagnosed intermittent explosive disorder and not premeditated and deliberate. The statements made immediately after defendant's arrest put into context defendant's responses in which he admitted shooting the victim.

3. Homicide—first-degree murder—motion to dismiss—sufficiency of evidence

The trial court did not err in a first-degree murder case by failing to dismiss the charge of first-degree murder based upon premeditation and deliberation due to alleged insufficient evidence. The evidence presented by the State was sufficient to withstand defendant's motion.

4. Homicide—first-degree murder—felony murder—discharging firearm into occupied property—motion to dismiss—sufficiency of evidence

The trial court did not err in a first-degree murder case by failing to dismiss the charge of first-degree murder based upon committing another felony during the murder due to insufficient evidence. The evidence supported the felony charge of discharging a firearm into occupied property. The State presented substantial evidence from which a jury could find at least one of the three shots defendant fired was "into" occupied property. Further, substantial evidence showed defendant was located outside the vehicle when he shot.

5. Homicide—first-degree murder—felony murder—jury charge—committing another felony during murder

The trial court did not err in a first-degree murder case by submitting to the jury the charge of first-degree murder on the theory of committing another felony during the murder as a permissible verdict. The State presented substantial evidence that defendant discharged a firearm into occupied property.

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[240 N.C. App. 246 (2015)]

Appeal by defendant from judgment entered 16 May 2014 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 4 March 2015.

Roy Cooper, Attorney General, by Steven M. Arbogast, Special Deputy Attorney General, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

TYSON, Judge.

Shannon Jerome Mitchell (“Defendant”) appeals from judgment entered after a jury conviction of first-degree murder. We find no error in Defendant’s conviction or the judgment entered thereon.

I. Factual Background

A grand jury indicted Defendant on one count of first-degree murder and one count of possessing a firearm while being a convicted felon on 20 May 2013. A jury trial was held on 28 April 2014 in New Hanover County Superior Court. Defendant pled guilty to possession of a firearm by a felon outside the presence of the jury. Judgment was continued on that charge until the conclusion of the trial. Defendant also stipulated to seven prior felony convictions within a twelve-year period, and prior conviction and record levels of III.

A. State’s Evidence

Gilbert McClammy (“Gilbert”) was renovating a house on Bladen Street in Wilmington, North Carolina for his stepson, Christopher James (“Christopher”) and Christopher’s girlfriend, Shiniqua Bunting (“Shiniqua”). Christopher and Shiniqua were expecting their first child together. Shiniqua is also the daughter of Defendant’s girlfriend, Catrina Bunting (“Catrina”).

On 27 April 2013, Gilbert offered to show Moise Tabon (“Moise”), his nephew, the house he was renovating. Moise and Gilbert stopped at Shiniqua’s grandmother’s house to pick up Shiniqua and Christopher and take them to the Bladen Street house.

Defendant and Catrina were also present at Shiniqua’s grandmother’s house. Defendant and Catrina asked Christopher to find out if Gilbert would give them a ride to a party. Gilbert agreed, so long as Defendant and Catrina contributed gas money. Shiniqua and Catrina rode in Gilbert’s vehicle. Christopher and Defendant rode in Moise’s

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vehicle. After stopping at a gas station, both vehicles were driven to a trailer park in Monkey Junction, North Carolina.

Christopher and Moise both testified as they pulled up to the trailer park, Defendant stated he “came to town on that day to shoot a guy so he could get the keys to his grandmother’s vehicle.”

Gilbert parked his vehicle in the driveway in front of one of the trailers. Moise pulled in behind Gilbert’s vehicle. Christopher, Shiniqua, Catrina, and Defendant exited the vehicles. Gilbert and Moise remained in the driver’s seats of their respective vehicles.

Defendant and Catrina wanted to attend a party taking place in Sea Breeze, North Carolina. Shiniqua testified Defendant stated he was going to ask Gilbert whether he was going to drive Catrina and Defendant to the party. Defendant walked over to Gilbert’s vehicle and “got in the car.” When Defendant got into Gilbert’s vehicle, his right leg and foot remained outside the vehicle.

Shiniqua and Christopher both testified they saw Gilbert lift his hands up to his face in a gesture indicating to them, “I can’t do it” or “I don’t know.” Almost immediately, Shiniqua, Christopher, and Catrina heard three gunshots in rapid succession. After the third gunshot, Defendant was entirely outside of Gilbert’s vehicle. He walked toward the location where Shiniqua, Gilbert, and Catrina were standing.

Catrina testified she observed Defendant exit Gilbert’s vehicle with a gun in his hand. She saw Defendant place the gun in his waistband. Catrina testified Defendant approached her and asked, “What happened?” Gilbert’s body fell out of his vehicle and onto the ground. Defendant asked Christopher to assist him in putting Gilbert’s lifeless body back into the vehicle. Christopher refused and Defendant ran off.

Shiniqua called the police. New Hanover County Sheriff’s Deputy David Swan arrested Defendant near the scene of the shooting. Defendant was charged with murder and taken to the booking area of the New Hanover County jail. All telephone calls from this area are recorded. Both individuals placing a call and the person receiving the call are informed the calls are subject to monitoring and recording.

While in the booking area, Defendant placed a telephone call to his father. A segment of this recorded call was admitted into evidence over Defendant’s objection. The jury heard a portion of the recorded call, which consisted of the following conversation between Defendant and his father:

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Father: I told you. You wouldn't listen, Junior. You wouldn't listen. Now who you done shot now?

Defendant: Trina daughter baby daddy, daddy. Man, I was just trying to talk to him, man, but . . .

Father: That same gun, right?

Defendant: Yeah, man.

Father: See what I try to tell you. You don't do what God wants you to do. I told you from under up of safety. I told you, Junior.

Defendant: I know, man.

2. Defendant's Evidence

Dr. George Corvin ("Dr. Corvin"), a general and forensic psychiatrist at North Raleigh Psychiatry, testified on Defendant's behalf as an expert witness in forensic psychiatry. Dr. Corvin interviewed Defendant for over two hours on 25 October 2013, reviewed discovery materials, and spoke with Defendant's family members. Dr. Corvin diagnosed Defendant with intermittent explosive disorder ("IED"). Dr. Corvin testified IED is an impulse control disorder characterized by recurrent behavioral outbursts representing a failure to control aggressive impulses. Dr. Corvin explained IED may lead to frequent verbal, threatening, destructive, or physically assaultive acts. Dr. Corvin also testified "the magnitude of the aggressiveness expressed during recurrent outbursts is grossly out of proportion to the provocation or to any precipitating psychosocial stressors."

Dr. Linda Graham ("Dr. Graham"), a psychiatrist at RHA Behavioral Health Services, also testified on Defendant's behalf as an expert witness in psychiatry. Dr. Graham evaluated Defendant as a walk-in patient in February 2013 for approximately one-half hour. Dr. Graham also diagnosed Defendant with IED.

On 16 May 2014, the jury returned a verdict finding Defendant guilty of first-degree murder. The jury found Defendant guilty both under the theory of premeditation and deliberation and under the theory of committing another felony during the murder.

The trial court consolidated the conviction of possession of a firearm by a felon with the first-degree murder conviction. The trial court sentenced Defendant to life imprisonment without the possibility of parole.

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Defendant gave notice of appeal in open court.

II. Issues

Defendant argues the trial court erred by (1) allowing witness testimony regarding Defendant's statements prior to the shooting; (2) admitting into evidence the recording of the jailhouse telephone call Defendant placed to his father; (3) failing to dismiss the charge of first-degree murder based upon premeditation and deliberation due to insufficient evidence; (4) failing to dismiss the charge of first-degree murder based upon committing another felony during the murder due to insufficient evidence; and (5) submitting to the jury the charge of first-degree murder on the theory of committing another felony during the murder as a permissible verdict. We address each issue in order.

III. Analysis**A. Defendant's Statements Prior to the Shooting**

[1] Defendant argues the trial court erred by allowing Moise and Christopher to testify Defendant made statements that "he had come to town that day to shoot someone about getting the keys to his grandmother's car." Defendant argues the statements were not relevant. Defendant also asserts the prejudicial impact of these statements greatly outweighed their probative value under Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403 (2013). We disagree.

1. Standard of Review

"Whether evidence is relevant is a question of law, thus we review the trial court's admission of the evidence *de novo*." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010) (citation omitted). However, whether to exclude evidence under Rule 403 is a decision within the trial court's discretion. *State v. Peterson*, 361 N.C. 587, 602, 652 S.E.2d 216, 227 (2007) (citation omitted), *cert. denied*, 552 U.S. 1271, 170 L.Ed.2d 377 (2008). Thus, "a trial court's ruling will be reversed on appeal only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Kirby*, 206 N.C. App. at 457, 697 S.E.2d at 503 (citation and internal quotation marks omitted).

2. Analysis

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence may be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice,

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confusion of the issues, or misleading the jury.” N.C. Gen. Stat. § 8C-1, Rules 401, 403 (2013).

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.” N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013). However, evidence of a defendant’s prior actions or conduct is admissible if it is relevant to any fact or issue other than the defendant’s character. *State v. Beckelheimer*, 366 N.C. 127, 130-31, 726 S.E.2d 156, 159 (2012).

Christopher and Moise both testified neither believed Defendant was referring to Gilbert when he stated he was going to “shoot a guy.” Defendant filed a motion *in limine* to suppress statements he made to Moise. This motion was extended to the statements heard by Christopher. The trial court denied Defendant’s motion after a *voir dire* evidentiary hearing.

Defendant argues the testimony of Moise and Christopher regarding the statements he made prior to shooting Gilbert were not relevant. He asserts both witnesses testified they did not believe Defendant was referring to shooting Gilbert. Defendant also asserts there was no probative value to outweigh the substantial prejudicial effect because this testimony was inadmissible “rank propensity evidence” barred by Rule 404(b). We disagree.

Rule 404(b) is a rule of inclusion, not exclusion. *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159. Our Supreme Court has stated Rule 404(b) is “subject to but one exception requiring the exclusion of evidence if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” *State v. Lyons*, 340 N.C. 646, 668, 459 S.E.2d 770, 782 (1995) (citation and quotation marks omitted). Defendant’s statements about his intent to shoot someone in order to retrieve the keys to his grandmother’s car, made immediately prior to the shooting of Gilbert, is relevant and admissible evidence.

The statements made by Defendant illustrate his state of mind near the time of the shooting. *State v. Jacobs*, 363 N.C. 815, 823, 689 S.E.2d 859, 864 (2010) (citation omitted) (holding evidence of victim’s prior bad acts, although impermissible character evidence if only relevant to show victim’s behavior at time of shooting, was relevant, admissible evidence to show defendant’s state of mind); see *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (noting Rule 404(b) is a rule of inclusion).

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Here, Defendant's state of mind just prior to the time of the shooting is relevant to the charge of first-degree murder under the theory of premeditation and deliberation. Premeditation and deliberation are generally proved by circumstantial evidence, not direct evidence. Premeditation and deliberation may be inferred through evidence of a defendant's mental processes at the time of the crime. *State v. Taylor*, 362 N.C. 514, 531, 669 S.E.2d 239, 256 (2008), *cert. denied*, 588 U.S. 851, 175 L.E.2d 84 (2009). The State argues Defendant's "cavalier attitude and mindset towards shooting a person" is relevant circumstantial evidence to show premeditation and deliberation.

The trial court conducted a lengthy *voir dire* and made detailed findings of fact to support its decision to admit testimony of Defendant's statements just before he shot Gilbert. Defendant has failed to show the trial court abused its discretion in admitting this evidence. This argument is overruled.

B. Recorded Telephone Call Between Defendant and His Father

[2] Defendant asserts the trial court erred by allowing the recorded telephone call to his father to be admitted into evidence and be heard by the jury. Defendant argues any minimal probative value of this evidence was substantially outweighed by the danger of unfair prejudice. We disagree.

1. Standard of Review

Whether to exclude otherwise relevant evidence under Rule 403 rests within the trial court's discretion. This Court reviews the decision of the trial court for an abuse of that discretion. *State v. Sims*, 161 N.C. App. 183, 190, 588 S.E.2d 55, 60 (2003). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985) (citation omitted).

2. Analysis

Defendant does not dispute the telephone call was relevant. Defendant only argues the recorded call should not have been admitted at trial pursuant to Rule 403. He asserts its probative value was outweighed by its prejudicial effect.

Defendant objected to the admission of the recorded call into evidence because of his father's statements of: "Now who you done shot now?" and "That same gun, right?" Defendant argues these statements may have caused the jury to believe Defendant had previously shot

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another person with the same firearm he used at bar. Defendant's counsel had conceded in his opening statements Defendant had shot and killed Gilbert. Defendant contends the only effect of these statements was to "excite prejudice."

Concessions made in opening statements by counsel do not constitute evidence. *State v. Lewis*, 321 N.C. 42, 49, 361 S.E.2d 728, 733 (1987). The State was not relieved of its burden of proving Defendant had unlawfully shot and killed Gilbert beyond a reasonable doubt. The State sought to introduce the recorded telephone call between Defendant and his father as direct evidence showing Defendant shot Gilbert. The telephone call also served as direct evidence that Defendant *knew* he had shot Gilbert. The telephone call was particularly probative in light of Defendant's defense that his actions were a result of his diagnosed IED and not premeditated and deliberate. The statements made by Defendant and his father immediately after Defendant's arrest put into context Defendant's responses in which he admitted shooting Gilbert.

Defendant failed to show the trial court abused its discretion in admitting the recorded telephone conversation into evidence. This argument is overruled.

C. Sufficiency of the Evidence: Premeditation and Deliberation

[3] Defendant argues the trial court erred in denying his motion to dismiss the charge of first-degree murder due to insufficient evidence of premeditation and deliberation.

1. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "A motion to dismiss based on insufficiency of the evidence to support a conviction must be denied if, when viewing the evidence in the light most favorable to the State, there is substantial evidence to establish each essential element of the crime charged and that defendant was the perpetrator of the crime." *State v. Cody*, 135 N.C. App. 722, 727, 522 S.E.2d 777, 780 (1999) (citation and internal quotation marks omitted).

Evidence does not have to be irrefutable or uncontroverted to be substantial. *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139-40 (2002). Substantial evidence "need only be such as would satisfy a reasonable mind as being adequate to support a conclusion." *Id.* (citation and internal quotation marks omitted). Whether substantial evidence has been

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presented requires us to “examine[] the sufficiency of the evidence presented but not its weight.” *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005) (citation omitted). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citation omitted).

2. Analysis

Defendant argues the State presented insufficient evidence for a jury to convict him of first-degree murder based on premeditation and deliberation.

Premeditation has been defined by [our Supreme Court] as thought beforehand for some length of time, however short. No particular length of time is required; it is sufficient if the process of premeditation occurred at any point prior to the killing. An unlawful killing is committed with deliberation if it is done in a cool state of blood, without legal provocation, and in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose. The intent to kill must arise from a fixed determination previously formed after weighing the matter.

State v. Corn, 303 N.C. 293, 297, 278 S.E.2d 221, 223 (1981) (citations and internal quotation marks omitted).

“Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence.” *State v. Brown*, 315 N.C. 40, 59, 337 S.E.2d 808, 822-23 (1985) (citation omitted), *cert. denied*, 476 U.S. 1165, 90 L.Ed.2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

Our Supreme Court delineated several factors from which premeditation and deliberation may be inferred. These circumstances include:

(1) *lack of provocation* on the part of the deceased, (2) the *conduct and statements* of the defendant *before and after* the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulties between the parties, (5) the *dealing of lethal blows after* the deceased has been *felled and rendered helpless*, (6) evidence that the *killing was done in a brutal manner*, and (7) the nature and number of the victim’s wounds.

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State v. Keel, 337 N.C. 469, 489, 447 S.E.2d 748, 759 (1994) (citation and quotation marks omitted) (emphasis supplied), *cert. denied*, 513 U.S. 1198, 131 L.Ed.2d 147 (1995). Neither all nor any certain combination of factors is required. The presence of any one factor may be sufficient. *Id.*

Defendant contends “[a]n analysis of the facts in the instant case reveal insubstantial evidence of premeditation and deliberation.” We disagree.

All evidence shows a complete lack of provocation by Gilbert. Gilbert had no prior history of confrontation or disputes with Defendant. Several witnesses testified Gilbert was seen putting his hands up in a gesture they believed to mean “now is not the time,” “I can’t do it,” or “I don’t know” moments before he was shot repeatedly. No evidence shows Gilbert being argumentative or combative. Gilbert was unarmed and sitting inside his vehicle.

Just prior to the shooting, Defendant told Moise and Christopher he was going to shoot a man over a trivial matter. While both men testified they did not believe Defendant was referring to Gilbert, both also testified they were troubled by Defendant’s cavalier attitude toward firearms and violent behavior. Defendant also asked Christopher to assist him in placing the lifeless Gilbert back inside the vehicle after his body fell out.

The State also presented evidence that Gilbert had a minor dispute with Shiniqua, the daughter of Defendant’s girlfriend, Catrina. Defendant was aware of this incident. Evidence showed Defendant may have felt some need to intervene in the matter between Gilbert and Shiniqua. Defendant asked Shiniqua about the incident on the day of the shooting.

Defendant shot Gilbert three times. Two of the wounds were fatal. One of the gunshots entered Gilbert’s body from the back. The State argued such a wound allows for the inference that Gilbert may have been turning away from or otherwise trying to escape from Defendant.

The evidence presented by the State was sufficient to withstand Defendant’s motion to dismiss. The weight to be given the evidence admitted was for the jury to resolve. *Benson*, 331 N.C. at 552, 417 S.E.2d at 765 (citation omitted). The jury returned a verdict finding Defendant guilty of first-degree murder on the theory of premeditation and deliberation. This argument is overruled.

D. Sufficiency of the Evidence: Felony Murder

[4] Defendant argues the trial court erred by denying his motion to dismiss the charge of first-degree murder based upon his commission of another felony during the murder. Defendant contends the State failed

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to present sufficient evidence of the underlying felony of discharging a firearm into occupied property to survive his motion to dismiss.

1. Standard of Review

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citation omitted). “A motion to dismiss based on insufficiency of the evidence to support a conviction must be denied if, when viewing the evidence in the light most favorable to the State, there is substantial evidence to establish each essential element of the crime charged and that defendant was the perpetrator of the crime.” *Cody*, 135 N.C. App. at 727, 522 S.E.2d at 780 (citation and internal quotation marks omitted).

Substantial evidence is such relevant evidence that a reasonable mind might accept as sufficient to support a conclusion. In examining the evidence, the court must view any contradictions or discrepancies in the light most favorable to the State, allowing all reasonable inferences to be drawn therefrom. A motion to dismiss is properly denied where there is substantial evidence supporting a finding that the offense charged was committed.

State v. Alexander, 152 N.C. App. 701, 705, 568 S.E.2d 317, 319 (2002) (citations and internal quotation marks omitted).

2. Analysis

Pursuant to N.C. Gen. Stat. § 14-34.1, “[a]ny person who willfully or wantonly discharges or attempts to discharge any firearm . . . into any . . . vehicle . . . while it is occupied is guilty of a Class E felony” N.C. Gen. Stat. § 14-34.1(a) (2013). Our Supreme Court has held a firearm is discharged “into” occupied property “even if the firearm itself is inside the property, so long as the person discharging it is not inside the property.” *State v. Mancuso*, 321 N.C. 464, 468, 364 S.E.2d 359, 362 (1988).

Defendant argues the State’s evidence was insufficient to establish that he was outside of the vehicle when he shot Gilbert. We disagree.

Christopher and Shiniqua both testified to having observed Defendant fire the shots that killed Gilbert. Shiniqua testified Defendant’s right leg was located outside of the vehicle, with his right foot on the ground, when Defendant fired the third and final shot. She also testified the lower half of Defendant’s left leg and the lower half of his right arm were the only parts of Defendant inside the door frame. Additional testimony showed Defendant’s left leg was “almost out” of the vehicle.

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Christopher also testified he heard the first two shots, and saw Defendant fire the third shot. He testified when Defendant fired the third shot, he also saw Defendant's right leg located outside of the vehicle, and his right foot was on the ground. Part of Defendant's left leg, slightly below the knee, was in the vehicle. Christopher also testified Defendant's hips, chest, and head were all outside of the vehicle. Defendant's right arm, up to approximately the middle of his forearm, was extended into the vehicle.

The State presented substantial evidence from which a jury could find at least one of the three shots Defendant fired was "into" occupied property. Any discrepancies or contradictions in the evidence were for the jury to resolve. *Benson*, 331 N.C. at 544, 417 S.E.2d at 761 (citation omitted) (holding "contradictions and discrepancies do not warrant dismissal . . . [but] are for the jury to resolve"). We conclude substantial evidence shows Defendant was located outside the vehicle when he shot Gilbert. *Alexander*, 152 N.C. App. at 705-06, 568 S.E.2d at 320 (holding substantial evidence existed from which a jury could find defendant discharged a firearm into occupied property where defendant was "almost leaning inside the car . . . definitely standing outside and in the crease of the door" when he shot the victim).

The evidence supports the felony charge of discharging a firearm into occupied property. The jury could properly convict Defendant of first-degree murder based on committing another felony during the murder. Defendant's argument is overruled.

**E. Jury Instruction of First-degree murder Based On
Felony Murder**

[5] Defendant argues the trial court erred by submitting to the jury the charge of first-degree murder on the theory of felony murder as a permissible verdict, as the underlying felony was not supported by the law or the facts of the case.

1. Standard of Review

This Court reviews jury instructions contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.] . . . Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated

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that such error was likely, in light of the entire charge, to mislead the jury.

State v. Blizzard, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (citation and internal quotation marks omitted).

2. Analysis

Defendant argues no evidence presented at trial supports the felony charge of discharging a firearm into occupied property. This charge was the underlying felony upon which the trial court permitted the jury to convict Defendant of first-degree murder based on a theory of felony murder.

As discussed above, the State presented substantial evidence that Defendant discharged a firearm into occupied property. The trial court's jury instruction permitting the jury to convict Defendant of first-degree murder based on a theory of felony murder was supported by the law and the facts in evidence. The trial court properly submitted the instructions and charge to allow the jury to convict Defendant of first-degree murder based on a theory of felony murder. This argument is overruled.

IV. Conclusion

Defendant received a fair trial free from prejudicial errors he preserved and argued. We find no error in Defendant's conviction or in the trial court's judgment entered thereon.

NO ERROR.

Judges STEPHENS and HUNTER, JR. concur.

STATE v. SANDERS

[240 N.C. App. 260 (2015)]

STATE OF NORTH CAROLINA

v.

MATTHEW SANDERS

No. COA14-818

Filed 7 April 2015

Probation and Parole—probation revocation hearing—held after probation ended—no subject matter jurisdiction

The Court of Appeals vacated the trial court's order revoking defendant's probation because the trial court lacked subject matter jurisdiction. Defendant's offenses were committed prior to 1 December 2009 and his probation revocation hearing was held after 1 December 2009, on 7 January 2014. There was no applicable tolling period, and the trial court's jurisdiction over defendant ended when his sixty-month probationary period ended on or about 17 April 2012.

Appeal by defendant from judgment entered 7 January 2014 by Judge Alma L. Hinton in Wake County Superior Court. Heard in the Court of Appeals 19 November 2014.

Attorney General Roy Cooper, by Assistant Attorney General Jill F. Cramer, for the State.

The Exum Law Office, by Mary March Exum, for defendant-appellant.

BRYANT, Judge.

Where defendant was not subject to a tolling period because his offenses were committed prior to 1 December 2009 and his probation revocation hearing was held after 1 December 2009, defendant's probationary period had expired and the trial court lacked jurisdiction to revoke defendant's probation.

On 1 November 2006, defendant Matthew Sanders pled guilty to one count of trafficking in cocaine by possession and one count of trafficking in cocaine by transportation in 06 CRS 70064-65, with sentencing to be continued. By judgment entered 17 April 2007, defendant was sentenced to a term of 35 to 42 months imprisonment. The trial court suspended defendant's sentence and imposed a term of supervised probation for 60 months.

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On 13 November 2008, a violation report was filed alleging defendant had violated probation by testing positive for cocaine and marijuana and by being in arrears towards his monetary obligations. On 31 March 2009, the trial court entered an order finding defendant was in compliance with the terms of his probation and to continue with his probation.

A new violation report, filed 29 March 2010, alleged that defendant had violated his probation by testing positive for cocaine, being in arrears on his monetary conditions, and by being currently unemployed. After a hearing, the trial court entered an order on 11 May stating that defendant “continues to test positive for cocaine” and that “defendant has been [sic] violated once and was continued on probation. *This case is currently in Toll status.*” (emphasis added).

In August 2010, a third violation report was filed alleging defendant had tested positive for cocaine and marijuana, had been convicted of assault/threat against a government official in 09 CRS 209018, and received a new case of probation.¹ By order entered 2 December, the trial court ordered defendant to have a TASC assessment completed within 45 days of entry and to serve 10 days in jail. A second order entered by the trial court on 24 February 2011 ordered defendant to attend a residential program at Day Dart Cherry² for 90 days.

On 19 July 2012, a violation report was entered alleging defendant had tested positive for cocaine and marijuana. Another report, entered 10 August, raised the same allegation. A third report, entered 7 September, stated that defendant had violated probation by testing positive for marijuana. Additional reports entered 11 October and 8 November further alleged defendant had tested positive for marijuana; the 11 October report also stated that defendant had failed to report for a scheduled office appointment. On 3 December 2012, the trial court ordered defendant to report to jail on 1 January 2013 for violating probation. After defendant failed to comply with the trial court’s order, another violation report was entered 4 January 2013 for failure to report as directed.

On 24 July 2013, a violation report was entered alleging defendant had been convicted and placed on twelve months supervised probation

1. Other than defendant’s probation case in 06 CRS 70064-65, no other probation cases are before this Court in this appeal.

2. Day Dart Cherry is a residential treatment facility for chemical dependency administered by the North Carolina prison system which assists probationers in transitioning back to their communities.

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in 12 CRS 2111169 for driving while impaired. By order entered 7 January 2014, the trial court revoked defendant's probation and sentenced defendant to 35 to 42 months imprisonment, with credit for 314 days already served. Defendant appeals.

On appeal, defendant raises two issues as to whether the trial court (I) lacked subject matter jurisdiction to revoke defendant's probation, and (II) lacked jurisdiction to enter orders prior to the revocation of probation.

I.

Defendant contends the trial court lacked subject matter jurisdiction to revoke defendant's probation. We agree.

This Court reviews *de novo* the issue of whether a trial court had subject matter jurisdiction to revoke a defendant's probation. *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citation omitted).

"A court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute." *State v. Burns*, 171 N.C. App. 759, 760, 615 S.E.2d 347, 348 (2005) (quoting *State v. Hicks*, 148 N.C. App. 203, 204, 557 S.E.2d 594, 595 (2001)). Pursuant to N.C. Gen. Stat. § 15A-1344,

[a]t any time prior to the expiration or termination of the probation period or in accordance with subsection (f) of this section, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. . . . If a probationer violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345 . . . may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing, if any

N.C.G.S. § 15A-1344(d) (2009). Prior to a 2009 amendment, a portion of subsection (d) read as follows: "The probation period shall be tolled if the probationer shall have pending against him criminal charges . . . which . . . could result in revocation proceedings against him for violation of the terms of this probation." *Id.* However, other than as provided

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in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant's probation after the expiration of the probationary term. *State v. Camp*, 299 N.C. 524, 527, 263 S.E.2d 592, 594 (1980) (citations omitted). Pursuant to N.C.G.S. § 15A-1344(f), a trial court may extend, modify, or revoke a defendant's probation after the expiration of the probationary term only if several conditions are met, including findings by the trial court that prior to the expiration of the probation period a probation violation had occurred *and* that a written probation violation report had been filed. Also, the trial court must find good cause for the extension, modification, or revocation. N.C.G.S. § 15A-1344(f). As such, a defendant's probation could be extended upon findings of specific actions that occurred prior to the end of a defendant's probationary period. However, on this record there is no indication that N.C.G.S. § 15A-1344(f) is applicable. Indeed, the State's argument as to jurisdiction is based solely on an application of the tolling provision. The tolling provision of N.C.G.S. § 15A-1344(d) was repealed in 2009, thus ending the tolling provision for defendants whose probation violation hearings were held after 1 December 2009. 2009 N.C. Sess. Laws ch. 372, § 20. Further, the tolling provision that was then moved to N.C.G.S. § 15A-1344(g) and allowed for a credit against a defendant's probation if a pending criminal charge resulted in an acquittal or dismissal was then removed when subsection (g) was repealed. *See* 2011 N.C. Sess. Laws 84, 87, ch. 62, § 3. Therefore, because there was no applicable tolling period, the trial court had no jurisdiction to revoke defendant's probation for offenses committed before 1 December 2009 and where defendant's probation revocation hearing was held after 1 December 2009. We hold that the trial court's jurisdiction over defendant ended on or about 17 April 2012, 60 months after defendant was placed on probation on 17 April 2007.

Our holding in this case, that the trial court lacked jurisdiction to revoke defendant's probation, is controlled by this Court's recent opinion in *State v. Sitosky*, ___ N.C. App. ___, 767 S.E.2d 623 (2014), *review and stay denied*, ___ N.C. ___, ___ S.E.2d ___ (March 5, 2015); *see also In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.”).

In *Sitosky*, the defendant was placed on probation in 2008 for offenses committed in 2007. In a probation violation hearing held in 2014, the defendant's probation was revoked for offenses committed since her probation began in 2008. This Court vacated and remanded

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finding that based on the 2009 North Carolina Session Law, a defendant “who committed her offenses . . . *prior to 1 December 2009* but had her revocation hearing *after 1 December 2009* was not covered by either statutory provision — § 15A-1344(d) or § 15A-1344(g) — authorizing the tolling of probation periods for pending criminal charges.” *Sitosky*, ___ N.C. App. at ___, 767 S.E.2d at 626.

In reviewing the record before this Court, it is clear that defendant committed his offenses on 3 November 2006, prior to 1 December 2009. Defendant’s probation revocation hearing was held on 7 January 2014, almost seven years after his 60 month probation order was entered on 17 April 2007, and well after 1 December 2009. As such, based on this Court’s holding in *Sitosky*, the trial court lacked jurisdiction to revoke defendant’s probation. Accordingly, the order of the trial court revoking defendant’s probation must be vacated. Also, accordingly, we need not address defendant’s second issue on appeal.

VACATED.

Judges DILLON and DIETZ concur.

STATE OF NORTH CAROLINA

v.

JACOB MARK SPIVEY

No. COA14-1046

Filed 7 April 2015

1. Indictment and Information—injury to real property—victim—legal entity capable of owning property

The indictment charging defendant with injury to real property was invalid on its face because it contained no allegation that the victim, Katy’s Great Eats, was a legal entity capable of owning property, and the name of the victim did not otherwise import a corporation or other entity capable of owning property.

2. Indictment and Information—victim’s name misspelled—corrected

The trial court did not err by allowing the State, after resting its case, to correct the name of the victim in the indictment that charged defendant with assault with a deadly weapon from “Christina Gibbs”

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to “Christian Gibbs.” The misspelling appeared inadvertent and did not mislead or surprise defendant as to the nature of the charges against him.

Appeal by Defendant from judgments entered 9 May 2014 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 5 February 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Brent D. Kiziah, for the State.

W. Michael Spivey, for the Defendant.

DILLON, Judge.

Jacob Mark Spivey (“Defendant”) appeals from judgments entered upon a jury verdict finding him guilty of one count of assault with a deadly weapon inflicting serious injury, six counts of assault with a deadly weapon, one count of felony hit and run, one count of injury to real property, and one count of reckless driving to endanger. We find no error in all but one of these convictions, arresting judgment on the charge of injury to real property, vacating the conviction, and remanding the case for resentencing.

I. Background

The evidence tended to show the following: In the evening hours of 11 January 2013, Defendant stepped outside of a bar, variously referred to at trial as “Katy’s,” “Katy’s Bar and Grill,” “Katy’s Grill and Bar,” and “Katy’s Great Eats.” Christina Short and another bar patron were already outside, talking with one another. Ms. Short began to tell jokes about President Obama, and turned to Defendant, who had been standing by himself nearby, and asked him which presidential candidate he voted for. Defendant replied that he had voted for President Obama. Ms. Short responded by laughing at Defendant and calling him “a stupid little f—er.” Defendant went back inside the bar.

A few minutes later, Defendant came back outside. As he was walking towards his car, Ms. Short asked him whether his daddy had bought him his car. Defendant responded by getting into his car, backing it up across the parking lot, and then driving it forward *into* the front of the bar, hitting Ms. Short, and injuring a number of people inside, including a man named Christian Gibbs.

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Police apprehended Defendant nearby, and he confessed to intentionally driving his car into the bar but maintained that he intended only to injure Ms. Short and not to kill her.

Defendant was indicted on a variety of charges stemming from the incident. The matter came on for a jury trial. The jury found Defendant guilty of one count of assault with a deadly weapon inflicting serious injury (for injuries to Ms. Short), one count of injury to real property (for damage to the bar), six counts of assault with a deadly weapon (for injuries to six patrons inside the bar), and other charges.

The court entered four judgments in total sentencing Defendant to active time as well as probation with additional conditions upon his release. Defendant entered notice of appeal in open court.

II. Analysis

Defendant makes two arguments on appeal, which concern the adequacy of two of the indictments. As he raises no other arguments, any challenges to his remaining convictions are waived. *See* N.C. R. App. P. 10.

A. Injury to Real Property

[1] Defendant argues that the trial court erred in denying his motion to dismiss the charge of injury to real property. Specifically, Defendant contends that the indictment – charging him with damaging the “real property, front patio, façade, and porch of the restaurant, the property of Katy’s Great Eats” – was invalid on its face because it failed to allege that “Katy’s Great Eats” was a legal entity capable of owning property. We agree. Accordingly, we arrest the judgment and vacate Defendant’s conviction for injury to real property.

A facially invalid indictment can be challenged at any time because it, as well as any trial or conviction that results from it, is a nullity. *State v. Call*, 353 N.C. 400, 428-29, 545 S.E.2d 190, 208 (2001).

It is a requirement that the indictment charging *certain* crimes involving property contain an allegation concerning the identity of the victim whose property was the subject matter of the crime. *See, e.g., State v. Price*, 170 N.C. App. 672, 673-74, 613 S.E.2d 60, 62 (2005) (injury to personal property); *State v. Phillips*, 162 N.C. App. 719, 720-21, 592 S.E.2d 272, 273 (2004) (larceny); *State v. Woody*, 132 N.C. App. 788, 789-90, 513 S.E.2d 801, 802-03 (1999) (conversion); *State v. Ellis*, 33 N.C. App. 667, 669, 236 S.E.2d 299, 301 (1977) (embezzlement). However, *other* crimes involving property do not have this requirement. *See, e.g., State v. Norman*, 149 N.C. App. 588, 592-93, 562 S.E.2d 453, 456-57 (2002)

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(breaking and entering with felonious intent to steal); *State v. Burroughs*, 147 N.C. App. 693, 696-97, 556 S.E.2d 339, 342 (2001) (attempted robbery with a firearm).

Our Court has held that the crime of injury to real property – for which Defendant was indicted and convicted – belongs to the former group, requiring that the indictment contain an allegation concerning the identity of the victim. *State v. Lilly*, 195 N.C. App. 697, 703, 673 S.E.2d 718, 722 (2009). *See also In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

For crimes – such as injury to real property – where the name of the victim must be alleged, our Supreme Court has explained that “[t]he name of the owner of [the] property [] is not a material part of the offence charged in the indictment,” but is required to be alleged “to identify the transaction, so that the defendant, by proper plea may protect himself against another prosecution for the same offence.” *State v. Bell*, 65 N.C. 313, 314 (1871) (victim is a natural person); *see also State v. Grant*, 104 N.C. 908, 910, 10 S.E. 554, 555 (1889) (corporate victim). However, our Supreme Court has held that where the victim is not a natural person, the indictment *must* allege that the victim is a legal entity capable of owning property, and must separately allege that the victim is such a legal entity *unless* the name of the entity itself, as alleged in the indictment, imports that the victim is such a legal entity. *State v. Thornton*, 251 N.C. 658, 661-62, 111 S.E.2d 901, 903-04 (1960). In *State v. Patterson*, 194 N.C. App. 608, 671 S.E.2d 357 (2009), for example, we stated that if the victim is a corporation, the requirement of *Thornton* is satisfied either where the indictment expressly alleges that the corporation is an entity capable of owning property, or where the corporate name alleged indicates that the entity is a corporation, “through the use of the word ‘incorporated’ or the like[.]” *Id.* at 613, 671 S.E.2d at 360. In *Patterson*, we held that an indictment was invalid on its face where it merely identified the victim as “First Baptist Church of Robbinsville,” because the name stated in the indictment did not clearly allege that the church was a corporation, nor did the indictment further allege that the church was an entity capable of owning property. *Id.* at 614, 671 S.E.2d at 360. *See also Woody*, 132 N.C. App. at 791, 513 S.E.2d at 803 (holding that an indictment identifying the victim using the term “unlimited” or “association” was not sufficient).

In the present case, the indictment does not contain any allegation that the victim, “Katy’s Great Eats,” is a legal entity capable of owning property, and the name “Katy’s Great Eats” does not otherwise import a corporation or other entity capable of owning property, as required. We,

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therefore, must conclude that the indictment charging Defendant with injury to real property is invalid on its face. Accordingly, we arrest the judgment on this charge and vacate Defendant's conviction, remanding the matter for resentencing.

B. Assault with a Deadly Weapon

[2] Defendant also argues that the evidence presented at trial varied fatally from one of the indictments charging him with assault with a deadly weapon and the trial court erred in allowing the State to amend this indictment. Specifically, Defendant contends that the court erred in allowing the State, after resting its case and over Defendant's objection, to correct the victim's name in the indictment from "Christina Gibbs" to "Christian Gibbs." We disagree.

Amending an indictment is statutorily prohibited. N.C. Gen. Stat. § 15A-923(e) (2013). However, our Supreme Court has interpreted the term "amendment" as it is used in the statute to mean "any change in the indictment which would substantially alter the charge set forth in the indictment." *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984). Therefore, where the evidence varies from the charge in the indictment, "[a] change in [the] indictment does not constitute an amendment where the variance [is] inadvertent and [the] defendant [is] neither misled nor surprised as to the nature of the charges." *State v. Campbell*, 133 N.C. App. 531, 535-36, 515 S.E.2d 732, 735 (1999). Furthermore, where the indictment does not vary *materially* from the evidence at trial, the indictment is not fatally defective even if it is never amended. *State v. Isom*, 65 N.C. App. 223, 226, 309 S.E.2d 283, 285 (1983). In either case, whether the variance is material depends upon whether the defendant was surprised, misled, or otherwise prejudiced *because of* the variance. See, e.g., *State v. Cameron*, 73 N.C. App. 89, 92-93, 325 S.E.2d 635, 637 (1985).

In numerous cases we have held that the correction of misspellings, the addition of omitted last names, and the switching of interposed names did not qualify as amendments within the meaning of the statutory prohibition. See, e.g., *State v. Holliman*, 155 N.C. App. 120, 126-27, 573 S.E.2d 682, 687 (2002) (one letter misspelled in the victim's name); *State v. McNair*, 146 N.C. App. 674, 676-77, 554 S.E.2d 665, 668 (2001) (one letter misspelled in the defendant's name); *State v. Marshall*, 92 N.C. App. 398, 401-02, 374 S.E.2d 874, 875-76 (1988) (omitted last name); *State v. Mason*, 222 N.C. App. 223, 227, 730 S.E.2d 795, 798-99 (2012) (interposed first, middle, and last name); *State v. Bailey*, 97 N.C. App.

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472, 475-76, 389 S.E.2d 131, 133 (1990) (interposed first and last name). We have recognized these corrections as appropriate before trial or after the State rests its case as long as the defendant is not prejudiced. See *Holliman*, 155 N.C. App. at 126-27, 554 S.E.2d at 668; *McNair*, 146 N.C. App. at 676-77, 554 S.E.2d at 668.

In the present case, one of the indictments charging Defendant with assault with a deadly weapon mistakenly identified the victim as “Christina Gibbs” rather than “Christian Gibbs.” The State moved to amend the indictment to correct this mistake after resting its case. The trial court heard argument and allowed the amendment. On direct examination two days beforehand, Mr. Gibbs had testified that he was among those present inside the bar at the time of the collision, and further, that the fender of Defendant’s vehicle actually made contact with his leg when it came through the front of the building. Subsequently, Defendant’s counsel cross-examined Mr. Gibbs. As in *Bailey*, the mistake in the present case appears to have been inadvertent, and we do not believe Defendant was “misled or surprised as to the nature of the charges against him.” 97 N.C. App. at 476, 389 S.E.2d at 133. Therefore, we hold that the change did not qualify as an amendment within the meaning of the statutory prohibition.

Defendant cites our Supreme Court’s decision in *State v. Abraham*, 338 N.C. 315, 451 S.E.2d 131 (1994), in support of his argument. We find the present case far more analogous to *Holliman* than *Abraham*. In *Holliman*, the victim’s name was misspelled. 153 N.C. App. at 126, 573 S.E.2d at 687. We reasoned that “the indictment sufficiently served the purpose of placing defendant on notice of the charge in order for him to prepare a defense,” concluding that there had been no error in correcting the misspelling. 155 N.C. App. at 126-27, 573 S.E.2d at 687. In the present case, the change did not name a completely different victim, as it had in *Abraham*.¹ See 338 N.C. at 339-40, 451 S.E.2d at 143-44. Instead, it inverted the letters “n” and “a” in the victim’s first name, correcting a misspelling. The present case is, therefore, distinguishable. Accordingly, this argument is overruled.

1. We note that we have previously clarified that *Abraham* is not a “blanket prohibition on changing the name of the victim in a criminal indictment,” and is, therefore, not inconsistent with allowing for the “correct[ion] [of] inadvertent mistakes in an indictment[.]” *McNair*, 146 N.C. App. at 678, 554 S.E.2d at 669.

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[240 N.C. App. 270 (2015)]

III. Conclusion

We arrest judgment on the charge of injury to real property and vacate the conviction, remanding the case to the trial court with instructions to resentence Defendant consistent with this opinion. We find no error in the challenged conviction of assault with a deadly weapon.

NO ERROR in part; VACATED AND REMANDED in part.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
JAMAR ISHMEAL WRIGHT, DEFENDANT

No. COA14-997

Filed 7 April 2015

Robbery—dangerous weapon—failure to instruct—extortion not a lesser-included offense

The trial court did not commit error, much less plain error, in a robbery with a dangerous weapon case by failing to instruct the jury on the charge of extortion. Defendant’s contention that the crime of extortion was a lesser included offense of armed robbery failed the definitional test adopted by our Supreme Court.

Appeal by Defendant from judgment entered 11 February 2014 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 5 February 2015.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General James M. Stanley, Jr., for the State.

Kevin P. Bradley for Defendant-appellant.

DILLON, Judge.

Jamar Ishmeal Wright (“Defendant”) appeals from a conviction of robbery with a dangerous weapon. For the following reasons, we find no error in Defendant’s trial.

STATE v. WRIGHT

[240 N.C. App. 270 (2015)]

I. Background

Defendant was indicted for robbery with a dangerous weapon and other charges arising from an incident which occurred when allegedly he entered the residence of another and brandished a gun. Defendant was tried by a jury. At trial, the State offered evidence which tended to show as follows: Chanel Brown asked Michael Kurz to repair her car by buying and installing a new alternator. She gave him \$150.00. However, on the day in question, Mr. Kurz used the \$150.00 to post bond for a crime he was charged with, planning to replace the money and repair Ms. Brown's car the next day. Hours after Mr. Kurz posted bond using Ms. Brown's money, Ms. Brown and two others forcibly entered the home of Mr. Kurz that he shared with his mother in order to get back Ms. Brown's money. After some discussion, Ms. Brown left the Kurz residence only to return soon later with Defendant. Defendant threatened the Kurzes, pulling out an automatic handgun. Mr. Kurz told Defendant that he would make arrangements with Ms. Brown for the next morning, but Defendant responded that Mr. Kurz' proposal was unacceptable.

Defendant and the others decided to take a computer belonging to Mr. Kurz' mother as "collateral[.]" which was worth approximately \$1,000.00. They informed Mr. Kurz that when he gave Ms. Brown the \$150.00 they would return the computer, "maybe," and that he "might get it back[.]" They further threatened to kill Mr. Kurz and his mother if Mr. Kurz called the police.

The next day police went to Ms. Brown's apartment, but she informed them that she and her companions had not taken anything from the Kurz residence. However, in fact, Ms. Brown had hidden the computer from the police. The computer was never returned to the Kurzes.

Defendant did not present any evidence at trial.

The jury found Defendant guilty of robbery with a dangerous weapon. The trial court sentenced Defendant to a term of 64 to 89 months of imprisonment. Defendant timely filed a written notice of appeal.

II. Analysis

Defendant argues on appeal that extortion, a Class F felony, is a lesser included offense of robbery with a dangerous weapon, a Class D felony, and that the trial court committed plain error in failing to instruct the jury on this lesser included offense. Essentially, Defendant contends that there was evidence from which a jury could have convicted Defendant of extortion based on the testimony that Defendant took the

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computer as collateral and brandished the gun to coerce Mr. Kurz to refund to Ms. Brown the \$150.00 she had given him. We disagree.

A. Lesser included offense

Defendant argues that “[b]ecause the essential elements of extortion—obtaining something of value by coercion—are essential elements of armed robbery, extortion is a lesser included offense of robbery with a dangerous weapon.” Defendant further contends that “[a]rmed robbery refines the elements of extortion by requiring the coercion to be by use or threatened use of a firearm or other dangerous weapon, by requiring property to be taken and not just anything of value, and by requiring intent to deprive the victim of the property permanently.” As Defendant’s argument presents a question of law, our standard of review is *de novo*. *State v. Nickerson*, 365 N.C. 279, 281, 715 S.E.2d 845, 846 (2011).

“It is well-settled that the trial court must submit and instruct the jury on a lesser included offense when . . . there is evidence from which the jury could find that defendant committed the lesser included offense.” *State v. Porter*, 198 N.C. App. 183, 189, 679 S.E.2d 167, 171 (2009) (marks omitted).

Here, we must first determine whether extortion is a lesser included offense of robbery with a dangerous weapon. In *State v. Weaver*, our Supreme Court adopted a “definitional” test rather than a “factual” test for determining whether one crime is a lesser included offense of another crime:

We do not agree with the proposition that the *facts* of a particular case should determine whether one crime is a lesser included offense of another. Rather, the *definitions* accorded the crimes determine whether one offense is a lesser included offense of another crime. In other words, all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a *definitional*, not a factual basis.

State v. Weaver, 306 N.C. 629, 635, 295 S.E.2d 375, 378-79 (1982) (emphasis in original), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993). Thus, the test is whether the essential elements of the lesser crime are essential elements of the greater crime. If the lesser crime contains at least one essential element

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that is *not* an essential element of the greater crime, then the lesser crime is not a lesser included offense.

On the one hand, N.C. Gen. Stat. § 14-118.4 (2012) provides, in pertinent part, that a person is guilty of extortion if that person “threatens or communicates a threat or threats to another with the intention thereby wrongfully to obtain anything of value or any acquittance, advantage, or immunity” Although not defined in the statute, “obtain” means “[t]o succeed in gaining possession of as the result of planning or endeavor; acquire.” The American Heritage College Dictionary 943 (3d ed. 1997). “The definition of extortion in G.S. 14-118.4 covers any threat made with the intention to wrongfully obtain ‘anything of value or any acquittance, advantage, or immunity.’” *State v. Greenspan*, 92 N.C. App. 563, 567, 374 S.E.2d 884, 886 (1989).

On the other hand, the elements necessary to constitute armed robbery under this section are: (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; and (3) whereby the life of a person is endangered or threatened. N.C. Gen. Stat. § 14-87 (2012).

Both armed robbery and extortion involve a threat. However, the subject matter of the threat is much broader for the crime of extortion. Specifically, where armed robbery requires that the subject matter be *personal property* which is taken and carried away, extortion permits obtaining “*anything* of value or any acquittance, advantage, or immunity.” See N.C. Gen. Stat. § 14-118.4. A thing “of value or acquittance, advantage, or immunity” could involve coercing someone not to file a civil suit or to go to the police rather than coercing someone to hand over an item of personal property. Therefore, Defendant’s contention that the crime of extortion is a lesser included offense of armed robbery fails the definitional test adopted by our Supreme Court. See *Weaver*, 306 N.C. at 635, 295 S.E.2d at 378-79. Accordingly, we hold that the trial court did not commit error, much less plain error, in failing to instruct the jury on the charge of extortion.

NO ERROR.

Judges GEER and STEPHENS concur.

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[240 N.C. App. 274 (2015)]

UNION COUNTY BOARD OF EDUCATION, PLAINTIFF
v.
UNION COUNTY BOARD OF COMMISSIONERS, DEFENDANT

No. COA14-633

Filed 7 April 2015

1. Schools and Education—appropriation of funds—legal standard—harmless error

The trial court did not abuse its discretion in a case requesting the appropriation of additional funds to a board of education by allowing plaintiff to argue an alleged improper legal standard in plaintiff's opening statements. While plaintiff's argument was technically correct, plaintiff's statement of the standard to the jury was misleading. However, as a result of the trial court's instructions and the verdict sheets, defendant was not prejudiced and thus it was harmless error.

2. Schools and Education—additional funding—evidence outside scope of proposed budget for pertinent fiscal year not allowed

The trial court erred by allowing plaintiff Union County Board of Education to present evidence of claimed needs outside the scope of plaintiff's proposed budget for the 2013-2014 fiscal year. N.C.G.S. § 115C-431(c) was never intended to open the door to allow the fact finder to consider evidence outside the scope of the proposed budget and award funding beyond that requested by the board of education, whose duty it is to request sufficient funding to maintain a system of free public schools.

3. Evidence—current school expense funding—sufficiency of evidence—outside scope of proposed budget

Although defendant board of commissioners contended that the trial court erred in a case seeking additional school funding to plaintiff board of education by denying its motions for a directed verdict based on insufficient evidence, plaintiff presented evidence tending to show current expense funding was needed to meet state mandates and policies and capital outlay funding was needed to maintain and repair school facilities. However, having determined that much of plaintiff's evidence was outside the scope of plaintiff's proposed budget for the 2013-2014 fiscal year and should not have been admitted into evidence at trial, the case was remanded for a new trial.

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[240 N.C. App. 274 (2015)]

4. Schools and Education—additional funding—requested instructions—proposed budget—students performing below grade level

The trial court did not err in a case seeking additional school funding to a board of education by failing to issue requested instructions limiting the jury's consideration to the proposed budget for the 2013-2014 fiscal year. The instructions closely followed the language of N.C.G.S. § 115C-431 and were not overly broad. However, the trial court erred by instructing the jury that students performing below grade level were not obtaining a sound basic education since the instructions likely misled the jury.

Appeal by defendant from judgment entered 10 October 2013 by Judge W. Erwin Spainhour in Union County Superior Court. Heard in the Court of Appeals 2 December 2014.

Schwartz & Shaw, P.L.L.C., by Richard Schwartz and Brian C. Shaw, for plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson; and Perry, Bundy, Plyler, Long & Cox, LLP, by H. Ligon Bundy and Christopher Cox, for defendant-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jill R. Wilson and Julia C. Ambrose; and the North Carolina School Boards Association, by Allison B. Schafer and Christine T. Scheef, on behalf of the North Carolina School Boards Association, amicus curiae.

Smith Moore Leatherwood LLP, by Elizabeth Brooks Scherer, Matthew Nis Leerberg, and Thomas E. Terrell, Jr., on behalf of the North Carolina Association of County Commissioners, amicus curiae.

McCULLOUGH, Judge.

The Union County Board of Commissioners ("defendant") appeals from a judgment ordering it to appropriate additional funds to the Union County Board of Education's ("plaintiff") local current expense and capital outlay funds for the 2013-2014 fiscal year. For the following reasons, we grant a new trial.

UNION CNTY. BD. OF EDUC. v. UNION CNTY. BD. OF COMM'RS

[240 N.C. App. 274 (2015)]

I. Background

This case concerns funding provided by defendant to plaintiff for the 2013-2014 fiscal year. The School Budget and Fiscal Control Act (the “Act”), N.C. Gen. Stat. § 115C-422 *et seq.*, governs such funding.

In general, the Act requires that “[e]ach local school administrative unit shall operate under an annual balanced budget resolution[,]” N.C. Gen. Stat. § 115C-425(a) (2013), which shall include at least the following funds: the State Public School Fund; the local current expense fund; and the capital outlay fund. N.C. Gen. Stat. § 115C-426(c) (2013). Pertinent to this case,

The local current expense fund shall include appropriations sufficient, when added to appropriations from the State Public School Fund, for the current operating expense of the public school system in conformity with the educational goals and policies of the State and the local board of education, within the financial resources and consistent with the fiscal policies of the board of county commissioners. These appropriations shall be funded by revenues accruing to the local school administrative unit by virtue of Article IX, Sec. 7 of the Constitution, moneys made available to the local school administrative unit by the board of county commissioners, supplemental taxes levied by or on behalf of the local school administrative unit pursuant to a local act or [N.C. Gen. Stat. §§] 115C-501 to 115C-511, State money disbursed directly to the local school administrative unit, and other moneys made available or accruing to the local school administrative unit for the current operating expenses of the public school system.

N.C. Gen. Stat. § 115C-426(e).

The capital outlay fund shall include appropriations for:

- (1) The acquisition of real property for school purposes, including but not limited to school sites, playgrounds, athletic fields, administrative headquarters, and garages.
- (2) The acquisition, construction, reconstruction, enlargement, renovation, or replacement of buildings and other structures, including but not limited to buildings for classrooms and laboratories, physical and vocational

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educational purposes, libraries, auditoriums, gymnasiums, administrative offices, storage, and vehicle maintenance.

(3) The acquisition or replacement of furniture and furnishings, instructional apparatus, data-processing equipment, business machines, and similar items of furnishings and equipment.

(4) The acquisition of school buses as additions to the fleet.

(5) The acquisition of activity buses and other motor vehicles.

(6) Such other objects of expenditure as may be assigned to the capital outlay fund by the uniform budget format.

. . . .

Appropriations in the capital outlay fund shall be funded by revenues made available for capital outlay purposes by the State Board of Education and the board of county commissioners, supplemental taxes levied by or on behalf of the local school administrative unit pursuant to a local act or [N.C. Gen. Stat. §§] 115C-501 to 115C-511, the proceeds of the sale of capital assets, the proceeds of claims against fire and casualty insurance policies, and other sources.

N.C. Gen. Stat. § 115C-426(f).

Furthermore, plaintiff and defendant are encouraged under the Act “to conduct periodic joint meetings during each fiscal year[.]” “[i]n order to promote greater mutual understanding of immediate and long-term budgetary issues and constraints[.]” N.C. Gen. Stat. § 115C-426.2 (2013). “In particular, the boards are encouraged to assess the school capital outlay needs, to develop and update a joint five-year plan for meeting those needs, and to consider this plan in the preparation and approval of each year’s budget under [the Act].” *Id.* Concerning budgets, the Act outlines a process and timeline for the preparation, proposal, approval, and submission by plaintiff to defendant of each year’s budget; as well as defendant’s action on plaintiff’s proposed budget. *See* N.C. Gen. Stat. §§ 115C-427 to -429.

In the present case, on 15 April 2013, plaintiff submitted its proposed budget for the 2013-2014 fiscal year to defendant in accordance with the

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requirements of N.C. Gen. Stat. § 115C-429(a).¹ In the budget, plaintiff requested \$86,180,152 in local current expense funding and \$8,357,859 in capital outlay funding. Upon review of plaintiff's proposed budget, on 17 June 2013, defendant adopted the county 2013-2014 budget ordinance. The budget ordinance included appropriations to plaintiff in the amount of \$82,260,408 for local current expense and \$3,000,000 for capital outlay, resulting in shortfalls of \$3,919,744 for local current expense and \$5,357,859 for capital outlay.

In response to the county 2013-2014 budget ordinance, on 18 June 2013, plaintiff adopted a resolution in which it determined "the amounts of money appropriated by [defendant] for the 2013-2014 school year to [plaintiff's] local current expense fund and capital outlay fund [were] not sufficient . . . to support a system of free public schools[.]" Thus, plaintiff directed its Chairman, superintendent, and attorneys to take the appropriate steps under N.C. Gen. Stat. § 115C-431 to resolve the budget dispute. In reaching the determination that the appropriations by defendant were inadequate, plaintiff indicated that, in addition to considering the amount of funds appropriated by defendant and defendant's ability to provide additional funding, it "considered the cumulative effect of the County of Union's inadequate appropriations for current expense and capital outlay in the preceding fiscal years[.]"

In accordance with the procedures set forth in N.C. Gen. Stat. § 115C-431(a) and (b), plaintiff and defendant participated in a joint meeting on 24 June 2013 in an attempt to resolve the budget dispute. When the parties failed to reach an agreement at the joint meeting, the parties participated in mediation sessions on 24 June, 28 June, and 31 July 2013. The mediation efforts concluded on 31 July 2013 with the mediator declaring an impasse.

The following day, 1 August 2013, plaintiff initiated this action against defendant pursuant to N.C. Gen. Stat. § 115C-431(c). In plaintiff's complaint, plaintiff sought "a determination of (i) the amount of money legally necessary from all sources and (ii) the amount of money legally necessary from [defendant], in order to maintain a system of free public schools as defined by State law and State Board of Education policy."

Defendant responded to plaintiff's complaint by answer filed 12 August 2013, the same day the case came on for trial in Union County Superior Court before the Honorable W. Erwin Spainhour.

1. "Fiscal year" is defined in the Act as "the annual period for the compilation of fiscal operations. The fiscal year begins on July 1 and ends on June 30." N.C. Gen. Stat. § 115C-423(4) (2013).

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Following a lengthy trial, on 10 October 2013, the jury returned a verdict finding that \$326,498,487 in current expense funding and \$89,184,005 in capital outlay funding was legally necessary from all sources in order to maintain a system of free public schools. The jury also found that an additional \$4,973,134 in current expense funding and an additional \$86,184,005 in capital outlay funding, beyond the amounts already appropriated by defendant, was legally necessary from defendant in order to maintain a system of free public schools.

The trial court entered judgment on the jury verdict ordering defendant “to appropriate to the local current expense fund of . . . [p]laintiff . . . the additional amount of \$4,973,134 for fiscal year 2013-2014, above that amount appropriated in the Union County Budget Ordinance adopted on June 17, 2013[]” and “to appropriate to the capital outlay fund of . . . [p]laintiff . . . the additional amount of \$86,184,005 for fiscal year 2013-2014, above that amount appropriated in the Union County Budget Ordinance adopted on June 17, 2013.” The trial court also authorized defendant, in accordance with N.C. Gen. Stat. § 115C-431, “to levy such taxes on property as it may choose to make up the difference, if any, when added to other revenues available for these purposes.” Defendant filed notice of appeal from the judgment on 17 October 2013.

II. Discussion

Defendant raises the following four issues on appeal: whether the trial court erred by (1) allowing plaintiff to argue an improper legal standard in its opening statements; (2) allowing plaintiff to present evidence of claimed needs outside the scope of plaintiff’s proposed budget for the 2013-2014 fiscal year; (3) denying defendant’s motions for a directed verdict; and (4) instructing the jury to apply a broad rather than restrictive definition of the amount legally necessary to maintain a system of free public schools in Union County.

1. Plaintiff’s Opening Statements

[1] Defendant first argues the trial court erred by allowing plaintiff to argue an improper legal standard in plaintiff’s opening statements. As both parties agree, we review the trial court’s decisions regarding opening statements for an abuse of discretion. *See State v. Speller*, 345 N.C. 600, 606, 481 S.E.2d 284, 287 (1997) (“The control of opening statements rests in the discretion of the trial court.”).

During opening statements in this case, plaintiff stated the following while explaining the issues to be decided by the jury:

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The issue that you're going to be asked to decide is the amount of money needed from the Commissioners to maintain the schools. It's not the amount of money needed to open the doors. That's not the standard. The standard is higher than that. We're going to open the doors. Come hell or high water, we're going to open the doors when those kids come. I'm going to get that off the table right now. So that's not an issue. But the standard is much higher than that, and the expectations are much higher than that. So the amount needed is now in your hands. It's up to you to determine. It's entirely up to you.

The Courts have made clear that the amount needed is not that which is absolutely necessary; it's that which is legally necessary, and reasonable and useful for the purposes sought. In making your decision, you have an opportunity to touch the future --

Upon hearing plaintiff's explanation of "the amount needed," defendant objected on the basis that plaintiff incorrectly stated the legal standard. The trial court, however, allowed plaintiff to continue without correction, stating, "[w]ell, it's [sic] opening statement. We'll see where -- what the evidence will show." Now on appeal, defendant contends the trial court erred because plaintiff's statement of the legal standard was similar to that rejected by our Supreme Court in *Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*, 363 N.C. 500, 681 S.E.2d 278 (2009).

At the time *Beaufort* was decided, in any action brought to resolve a budget dispute pursuant to N.C. Gen. Stat. § 115C-431(c), "the trial court [was] charged to 'find the facts as to the amount of money necessary to maintain a system of free public schools, and the amount of money needed from the county to make up this total.' " *Id.* at 503, 681 S.E.2d at 281 (quoting N.C. Gen. Stat. § 115C-431(c) (2007)).

In *Beaufort*, our Supreme Court addressed the constitutionality of the statutory framework in N.C. Gen. Stat. § 115C-431(c) for resolving budget disputes and reviewed whether the statutory framework was properly applied in the case. *Id.* at 502, 681 S.E.2d at 280. In doing so, the Court considered "the meaning of the terms 'necessary' and 'needed,' as used in [N.C. Gen. Stat. § 115C-]431(c), in light of Article IX, Section 2(2) of the State Constitution." *Id.* at 505, 681 S.E.2d at 283. Upon recognizing the terms were "susceptible to reasonable interpretations of varying strictness," and that, "[i]f a fact-finder were to interpret 'necessary' or

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'needed' in [N.C. Gen. Stat. § 115C-]431(c) expansively, there [was] a danger that the resulting verdict could intrude on a county commission's funding discretion under Article IX, Section 2(2) . . . [,]" the Court adopted a restrictive interpretation of the terms "necessary" and "needed." *Id.* at 505-06, 681 S.E.2d at 283. The Court explained that, "[s]o construed, [N.C. Gen. Stat. § 115C-]431(c)'s requirement that county commissions provide the minimum level of funding required by state law does not abrogate their discretionary authority to contribute more." *Id.*

Our Supreme Court then addressed whether the *Beaufort* trial court erred when it "instructed the jury that the word 'needed' in [N.C. Gen. Stat. § 115C-]431(c) means that which is reasonable and useful and proper or conducive to the end sought." *Id.* at 507, 681 S.E.2d at 283 (quotation marks omitted). Having determined a restrictive interpretation of the terms "necessary" and "needed" was necessary to preserve the discretionary authority of county commissions, the Court held the instruction to the jury in *Beaufort* "conveyed an impermissible, expansive definition" and was in error. *Id.* Thus, the Court remanded the case for a new trial noting the following:

At that trial, the trial court should instruct the jury that [N.C. Gen. Stat. § 115C-]431(c) requires the County Commission to provide that appropriation *legally necessary* to support a system of free public schools, as defined by Chapter 115C and the policies of the State Board. The trial court should also instruct the jury, in arriving at its verdict, to consider the educational goals and policies of the state, the budgetary request of the local board of education, the financial resources of the county, and the fiscal policies of the board of county commissioners. *See* [N.C. Gen. Stat.] § 115C-426(e) (2007). Anything beyond this measure of damages impermissibly infringes upon the discretionary authority of the County Commission under Article IX, Section 2(2) of the State Constitution and may not be awarded by a jury.

Id. at 507, 681 S.E.2d at 283-84 (emphasis added).²

2. Subsequent to the *Beaufort* decision and during the pendency of the current budget dispute, prior to the filing of this case, the General Assembly amended N.C. Gen. Stat. § 115C-431(c) to reflect the Court's holding in *Beaufort*. Thus, N.C. Gen. Stat. § 115C-431(c) now charges the fact finder to determine the amount of money "legally necessary" as opposed to the amount of money "needed" and "necessary." 2013 N.C. Sess. Laws 2013-141, sec. 1, eff. June 19, 2013.

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As noted above, in this case, plaintiff stated to the jury during its opening statements that the standard to be applied in determining the amount of funding “is not that which is absolutely necessary; it’s that which is legally necessary, and reasonable and useful for the purposes sought.” Although, the standard communicated by plaintiff to the jury is similar to the one rejected in *Beaufort*, plaintiff contends its use of the “reasonable and useful” language was not inconsistent with *Beaufort* because the language was joined to the correct standard, “legally necessary,” by the conjunction “and” and therefore did not supersede what was “legally necessary.” While plaintiff’s argument is technically correct, we find plaintiff’s statement of the standard to the jury misleading and, therefore, hold the trial court erred in allowing plaintiff to communicate a standard that included language mirroring that rejected in *Beaufort*. Nevertheless, we hold the error was harmless.

In charging the jury in *Beaufort*, the trial court instructed the jury to apply a broad definition of “needed” and “necessary” to determine the amount of funding to be awarded. In the present case, however, the overly broad language rejected in *Beaufort* was only communicated to the jury in plaintiff’s opening statements. Following weeks of evidence, the trial court instructed the jury that it must apply the law it provides in the jury instructions and stated the proper legal standard as follows:

The issue to be decided by you, the jury, is as follows:

“What amount of money is *legally necessary* from all sources and what amount of money is *legally necessary* from the board of county commissioners in order to maintain a system of free public schools as defined by state law and State Board of Education policy?”

(Emphasis added.) The trial court then repeatedly emphasized the proper legal standard throughout its instructions to the jury without reference to the language rejected in *Beaufort*. Moreover, the trial court provided the jury with verdict sheets incorporating the correct legal standard. As a result of the trial court’s instructions and the verdict sheets, we hold defendant was not prejudiced by plaintiff’s improper statements during its opening statements to the jury.

2. Evidence

[2] Defendant next argues the trial court erred by allowing plaintiff to present evidence of claimed needs outside the scope of plaintiff’s proposed budget for the 2013-2014 fiscal year.

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Generally, we review the trial court's decisions regarding the admissibility of evidence for abuse of discretion, *see State v. Shuford*, 337 N.C. 641, 649, 447 S.E.2d 742, 747 (1994), and “[e]videntiary errors are [considered] harmless unless . . . a different result would have been reached at trial.” *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001). Yet, a trial court's rulings on relevancy are not technically discretionary and therefore are not afforded as much deference. *See Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004).

On the day the case came on for trial, 12 August 2013, defendant filed a motion in limine in which defendant sought to exclude the following:

4. Any suggestion, information, documents, statements, or evidence of capital outlay needs that . . . [p]laintiff did not request . . . [d]efendant to fund in its 2013-2014 [fiscal year] budget, or information, documents, statement, or evidence of the future capital outlay needs of . . . [p]laintiff upon the grounds that . . . [p]laintiff is required by [N.C. Gen. Stat. §] 115C-521(b) to present its request for capital needs for each fiscal year with its annual budget, and [d]efendant has no duty to fund any item of [p]laintiff's capital needs until . . . [p]laintiff has made a request for such needs.
5. Any suggestion, information, documents, statements, or evidence that [d]efendant has failed to provide adequate funding for current expense and/or capital outlay in years preceding the 2013-2014 fiscal year, upon the grounds that the issue before the Court concerns whether . . . [d]efendant has adequately funded . . . [p]laintiff's proposed 2013-2014 budget request, in order for . . . [p]laintiff to “support a system of free public schools.” Plaintiff has the annual right and duty under [N.C. Gen. Stat. §] 115C-431 to institute a proceeding each year for additional funding if it determines that [d]efendant has not adequately provided sufficient local funds to support a system of free public schools for that fiscal year. Once [p]laintiff has accepted the money appropriated by [d]efendant for a fiscal year and has adopted its own budget, it has acknowledged that it has been adequately funded for that fiscal year, and may not later contend that it was inadequately funded for that year.

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During arguments on the motion, defendant explained to the trial court that plaintiff indicated it had capital outlay needs beyond those in the proposed budget and that it would seek additional capital outlay funding beyond the \$5,357,859 portion of the proposed budget for capital outlay that defendant did not fund in the county budget ordinance. Defendant indicated “that’s what [the] motion is directed at; is [plaintiff’s] contention that they are entitled to present evidence and seek more than they requested in their . . . [proposed budget].” Defendant then asserted plaintiff was bound by the proposed budget for the 2013-2014 fiscal year.

In response, plaintiff looked to the language of N.C. Gen. Stat. § 115C-431(c) and argued the statute was specific and clear that “the issue to be submitted to the jury is that the jury finds the amount needed to maintain a system of free public schools[.]” Plaintiff then argued they should be able to present any evidence of the actual needs of the school system without regard to its proposed budget for the 2013-2014 fiscal year because there was nothing in N.C. Gen. Stat. § 115C-431(c) restricting the jury’s consideration to the proposed budget. Plaintiff stated N.C. Gen. Stat. § 115C-431 does not even mention the proposed budget as a consideration for the jury.

Upon considering the arguments, the trial court denied defendant’s motion, reasoning that N.C. Gen. Stat. § 115C-431(c) was very specific and any evidence relating to the amount of money legally necessary from all sources and the amount of money legally necessary from defendant to support the school system, regardless of whether plaintiff requested funding for it in the proposed budget, should be considered by the jury. Thereafter, over defendant’s objections at trial, the trial court allowed plaintiff to present evidence outside the scope of its proposed budget for the 2013-2014 fiscal year.

In order to determine whether the trial court erred in allowing evidence outside the scope of plaintiff’s proposed budget for the 2013-2014 fiscal year, we must determine the scope of the proceedings; specifically whether the proceedings are limited to the proposed budget. Upon review, we hold the budget dispute proceedings are limited to a consideration of the proposed budget for the fiscal year at issue and, therefore, the trial court erred in this case by allowing evidence outside the scope of plaintiff’s proposed budget for the 2013-2014 fiscal year into evidence at trial.

In reaching this conclusion, we interpret N.C. Gen. Stat. § 115C-431(c) in the context of the Act. As this Court explained in *Baumann-Chacon v. Baumann*,

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[t]he principal goal of statutory construction is to accomplish the legislative intent. The best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish. Individual expressions must be construed as part of the composite whole and be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit. The Court may also consider the policy objectives prompting passage of the statute and should avoid a construction which defeats or impairs the purpose of the statute.

212 N.C. App. 137, 140, 710 S.E.2d 431, 434 (2011) (quotation marks and citations omitted); *see also Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81-82, 347 S.E.2d 824, 828 (1986) ("Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish.").

As stated in N.C. Gen. Stat. § 115C-424, "[i]t [was] the intent of the General Assembly by enactment of [the Act] to prescribe for the public schools a uniform system of budgeting and fiscal control." N.C. Gen. Stat. § 115C-424 (2013). In order to accomplish this goal, the Act provides a step-by-step budget process. In *Beaufort*, our Supreme Court summarized the process as follows:

The local school board first creates a budget setting out its estimate of the cost of providing education within its locale for the upcoming year and submits that budget to the county commission. *See* [N.C. Gen. Stat.] § 115C-429(a) (2007). The county commission then determines the amount of funds to be appropriated to the school board. *See* [N.C. Gen. Stat.] § 115C-429(b) (2007). If there is a dispute between the school board and the county commission, the two boards meet with a mediator in an effort to negotiate a compromise. *See* [N.C. Gen. Stat.] § 115C-431(a). If there is still no agreement, representatives from the two boards enter a formal mediation. *See* [N.C. Gen. Stat.] § 115C-431(b). If no agreement can be reached at the mediation, the school board may file an action in superior court. *See* [N.C. Gen. Stat.] § 115C-431(c).

363 N.C. at 503, 681 S.E.2d at 281.

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N.C. Gen. Stat. § 115C-431(c), which governs a schools board's suit against a county commission, provides the following:

(c) Within five days after an announcement of no agreement by the mediator, the local board of education may file an action in the superior court division of the General Court of Justice. Either board has the right to have the issues of fact tried by a jury. When a jury trial is demanded, the cause shall be set for the first succeeding term of the superior court in the county, and shall take precedence over all other business of the court. However, if the judge presiding certifies to the Chief Justice of the Supreme Court, either before or during the term, that because of the accumulation of other business, the public interest will be best served by not trying the cause at the term next succeeding the filing of the action, the Chief Justice shall immediately call a special term of the superior court for the county, to convene as soon as possible, and assign a judge of the superior court or an emergency judge to hold the court, and the cause shall be tried at this special term. The judge shall find, or if the issue is submitted to the jury, the jury shall find the facts as to the following in order to maintain a system of free public schools as defined by State law and State Board of Education policy: (i) the amount of money legally necessary from all sources and (ii) the amount of money legally necessary from the board of county commissioners. In making the finding, the judge or the jury shall consider the educational goals and policies of the State and the local board of education, the budgetary request of the local board of education, the financial resources of the county and the local board of education, and the fiscal policies of the board of county commissioners and the local board of education.

All findings of fact in the superior court, whether found by the judge or a jury, shall be conclusive. When the facts have been found, the court shall give judgment ordering the board of county commissioners to appropriate a sum certain to the local school administrative unit, and to levy such taxes on property as may be necessary to make up this sum when added to other revenues available for the purpose.

N.C. Gen. Stat. § 115C-431(c).

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Plaintiff, just as it argued at trial, looks to this language and argues N.C. Gen. Stat. § 115C-431(c) is specific as to the issues to be decided by the jury and because there is no language restricting the jury's determination to those amounts sought in its proposed budget, all evidence related to its funding needs was properly admitted. Plaintiff further argues the General Assembly could have easily limited the proceedings to a consideration of those amounts in the proposed budget had it intended to so.

Although N.C. Gen. Stat. § 115C-431(c) does not explicitly state that the proceedings are limited to plaintiff's proposed budget, sub-section (c) does include plaintiff's proposed budget as one of the mandatory considerations for the fact finder in determining the amounts legally necessary to maintain a system of free public schools. *See* N.C. Gen. Stat. § 115C-431(c) ("In making the finding, the judge or the jury shall consider . . . the budgetary request of the local board of education . . ."). Moreover, it is evident from the remainder of N.C. Gen. Stat. § 115C-431 that the proposed budget is the principal focus of the entire dispute resolution process. Prior to the filing of a lawsuit under N.C. Gen. Stat. § 115C-431(c), N.C. Gen. Stat. §§ 115C-431(a) and (b) require plaintiff and defendant to attempt to settle the budget dispute at a joint meeting and, if necessary, through additional mediation efforts. N.C. Gen. Stat. § 115C-431(a), which sets forth guidelines for the joint meeting, states that "[a]t the joint meeting, the *entire school budget* shall be considered carefully and judiciously, and the two boards shall make a good-faith attempt to resolve the differences that have arisen between them." N.C. Gen. Stat. § 115C-431(a) (emphasis added).

Based on the language of the N.C. Gen. Stat. § 115C-431, we hold the amounts requested in plaintiff's proposed budget are what are at issue in a budget dispute under N.C. Gen. Stat. § 115C-431. This result seems common sense, as a budget dispute only arises when defendant does not fully fund plaintiff's proposed budget.

We find further support for this conclusion when N.C. Gen. Stat. § 115C-431 is viewed in the context of the entire budget process, considering the respective roles of plaintiff and defendant.

N.C. Gen. Stat. § 115C-521(b), which is outside the Act but related to the budget process, provides the following:

It shall be the duty of the boards of education of the several local school administrative school units of the State to make provisions for the public school term by providing adequate school buildings equipped with suitable

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school furniture and apparatus. *The needs and the cost of those buildings, equipment, and apparatus, shall be presented each year when the school budget is submitted to the respective tax-levying authorities.* The boards of commissioners shall be given a reasonable time to provide the funds which they, upon investigation, shall find to be necessary for providing their respective units with buildings suitably equipped, and it shall be the duty of the several boards of county commissioners to provide funds for the same.

N.C. Gen. Stat. § 115C-521(b) (2013) (emphasis added). Thus, as defendant argues, it is plaintiff's role to determine the capital outlay needs of the school system each year and to include those costs in their proposed budget each year. Defendant then reviews plaintiff's proposed budget and makes appropriations.

While plaintiff acknowledges that its role is to determine the amount of funding necessary, it argues the proposed budget is just an estimate and it is the fact finder who determines the amount legally necessary. Plaintiff argues limiting the evidence to the proposed budget in this case would have the effect of authorizing legally insufficient funding because the fact finder found funding beyond the amount requested in plaintiff's proposed budget was legally necessary. Plaintiff further contends that defendant was well aware of the school system's outstanding capital needs from prior years that were unfunded and therefore defendant had reasonable time to make funding decisions. We are not persuaded by plaintiff's arguments.

N.C. Gen. Stat. § 115C-521(b) makes clear that plaintiff must assess the capital needs of the school system and present those needs to defendant "each year." Each year is then treated individually in the budget process. By implication, if plaintiff does not initiate the dispute resolution process in N.C. Gen. Stat. § 115C-431, it has accepted that the appropriations by defendant were sufficient for that year. Unfunded requests from prior year's proposed budgets are not automatically carried forward and considered in subsequent years. If plaintiff wants those previously unfunded amounts considered, it must include them in the proposed budget for the 2013-2014 fiscal year.

Moreover, plaintiff's argument that limiting the evidence to those amounts requested in its proposed budget would authorize legally insufficient funding presumes that plaintiff requested an amount of funds below the amount legally necessary to maintain a system of free public

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schools. We do not accept this presumption. While plaintiff's proposed budget may be an estimate, it is not a blind guess and we do not accept plaintiff's suggestion that it underestimated the capital outlay needs of the school system by over \$80,000,000.

The purpose of the budget dispute resolution process outlined in N.C. Gen. Stat. § 115C-431 is to provide an expedited process to resolve budget disputes between a board of education and a board of county commissioners when the board of education's proposed budget is not fully funded. We hold N.C. Gen. Stat. § 115C-431(c) was never intended to open the door to allow the fact finder to consider evidence outside the scope of the proposed budget and award funding beyond that requested by the board of education, whose duty it is to request sufficient funding to maintain a system of free public schools.

3. Directed Verdict

[3] At the conclusion of plaintiff's evidence, and again at the close of all the evidence, defendant moved for a directed verdict on the ground that plaintiff failed to present sufficient evidence for the jury to decide the amount of money legally necessary to maintain a system of free public schools. The trial court denied both motions.

In this third issue on appeal, defendant now contends the trial court erred in denying its motions for a directed verdict.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)).

In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke Univ., 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

"[U]nder [N.C. Gen. Stat.] § 115C-431(c), a school board must present evidence of (1) the amount of money it needs to maintain its school system, and (2) the amount it needs from the county in order to have

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the necessary amount.” *Duplin Cnty. Bd. of Educ. v. Duplin Cnty. Bd. of Cnty. Comm’rs*, 201 N.C. App. 113, 122, 686 S.E.2d 169, 174 (2009). As the Court made clear in *Beaufort*, the amount of money “needed” or “necessary” is that amount “legally necessary” to support a system of free public schools. 363 N.C. at 507, 681 S.E.2d at 283.

In the present case, defendant argues “[plaintiff] failed to meet its basic burden of proof to show what amount was legally necessary to maintain a system of free public schools, and, thus, in turn failed to show how [defendant’s] funding fell short of the legally necessary level.” Defendant asserts plaintiff “simply failed to present evidence on the annual cost of providing a county-wide system of education both as to capital and current expenditures.”

Upon a review of the evidence, we disagree. Specifically, plaintiff presented evidence tending to show current expense funding was needed to meet state mandates and policies and capital outlay funding was needed to maintain and repair school facilities. However, having determined above that much of plaintiff’s evidence was outside the scope of plaintiff’s proposed budget for the 2013-2014 fiscal year and should not have been admitted into evidence at trial, we remand for a new trial; it is too difficult to distinguish what evidence in the weeks long trial was within the scope of plaintiff’s proposed budget.

4. Jury Instructions

[4] In the final issue on appeal, defendant contends the trial court erred in issuing a broad rather than restrictive definition of the amount of money legally necessary to maintain a system of free public schools. Specifically, defendant argues the trial court erred by failing to issue requested instructions limiting the jury’s consideration to the proposed budget for the 2013-2014 fiscal year and by instructing the jury that students performing below grade level were not obtaining a sound basic education. Because similar jury instructions are likely to be issued on retrial, we address defendant’s arguments.

On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must

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be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Hammel v. USF Dugan, Inc., 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006) (citations and quotation marks omitted).

Defendant first argues the trial court erred by not instructing the jury to limit its consideration to those amounts plaintiff requested in its proposed budget for the 2013-2014 fiscal year. We disagree.

A review of the trial court's instructions to the jury reveals that the instructions closely followed the language of N.C. Gen. Stat. § 115C-431 and were not overly broad. In fact, the trial court included language directing the jury to consider "the budgetary request of [plaintiff,]" among other factors provided in N.C. Gen. Stat. § 115C-431(c). We hold these instructions were sufficient to present the law to the jury, and had the trial court properly limited the evidence to the scope of plaintiff's proposed budget, plaintiff's requested instruction would have been unnecessary.

Defendant also argues the trial court misled the jury when it misinterpreted the elements of a sound basic education set forth in *Leandro v. State of North Carolina*, 346 N.C. 336, 488 S.E.2d 249 (1997), and *Hoke Cnty. Bd. of Educ. v. State of North Carolina*, 358 N.C. 605, 599 S.E.2d 365 (2004). Specifically, defendant takes issue with the following instructions:

The North Carolina Constitution provides every child the constitutional right to a sound basic education

A student who is performing below grade level . . . is not obtaining a sound basic education in the subject matter being tested. A student who is performing at grade level or above . . . is obtaining a sound basic education

Defendant argues these instructions misled the jury to believe that "students were only being provided a sound basic education if they were performing at grade level, suggesting if any student was not so performing, [Union County] was not providing a sound basic education and, thus, failing to provide a system of free public schools."

Upon review, we agree that this portion of the trial court's instructions likely misled the jury and was error. School funding cannot guarantee student performance; but only the opportunity for students to receive a sound basic education. That is why in *Leandro*, our Supreme

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Court expressly rejected the notion that our constitution provides every child the right to a sound basic education, noting “[s]ubstantial problems have been experienced in those states in which the courts have held that the state constitution guaranteed the right to a sound basic education[]” and “the framers of our Constitution did not intend to set such an impractical or unattainable goal.” 346 N.C. at 350-51, 488 S.E.2d at 257. Instead, the Court held “Article IX, Section 2(1) of the North Carolina Constitution requires that all children have the *opportunity* for a sound basic education” *Id* at 351, 488 S.E.2d at 257 (emphasis added).

III. Conclusion

Having determined the budget dispute resolution process outlined in N.C. Gen. Stat. § 115C-431 concerns plaintiff’s proposed budget for the 2013-2014 fiscal year, we hold the trial court erred in allowing evidence outside the scope of the proposed budget for the 2013-2014 fiscal year into evidence and remand for a new trial.

NEW TRIAL.

Judges CALABRIA and STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 APRIL 2015)

BERTRAND v. CABELLO No. 14-265	Catawba (10CVD3566)	Affirmed
BIRCKHEAD v. N.C. DEP'T OF PUB. SAFETY No. 14-890	N.C. Industrial Commission (W63959)	Affirmed
CITIBANK, N.A. v. MICHAUX No. 14-667	Durham (10CVD5483)	Affirmed
ELIZABETH TOWNES HOMEOWNERS ASS'N, INC. v. JORDAN No. 14-767	Mecklenburg (11CVS5323)	Affirmed
ESPEY v. SELECT PORTFOLIO SERVS., INC. No. 14-961	Buncombe (13CVS1933)	Dismissed
HAILEAB v. JOHN Q. HAMMONS HOTELS No. 14-333	N.C. Industrial Commission (886537) (W06274)	Affirmed
IN RE FORECLOSURE OF BRITTAIN No. 14-1078	Henderson (12SP513)	Affirmed in Part, Dismissed in Part.
IN RE FORECLOSURE OF VICKS No. 14-222	Union (11SP659)	Affirmed
IN RE A.B. No. 14-1108	Forsyth (12J198)	Affirmed
IN RE A.T.H. No. 14-1197	Guilford (12JT523) (12JT524) (12JT528)	Affirmed
IN RE A.W. No. 14-1051	Cleveland (10JT154) (13JT10) (13JT11)	Affirmed
IN RE C.M. No. 14-780	Mecklenburg (13JB710)	Affirmed

IN RE D.W.L. No. 14-1145	Buncombe (12JT14)	Affirmed
IN RE L.L.B. No. 14-1106	Columbus (11JT92)	Affirmed
IN RE L.T.L. No. 14-1154	Guilford (12JT409-411)	Affirmed
IN RE N.K.M. No. 14-855	Chatham (12JT70)	Affirmed
IN RE R.W. No. 14-1081	Dare (11JT44)	Affirmed
IN RE S.W. No. 14-992	Vance (13JA20)	Affirmed
KIRKWOOD v. KIRKWOOD No. 14-702	Craven (10CVD1142)	Affirmed
LAMM v. TILL No. 14-828	Iredell (11CVS175)	No Error
MINAR v. MURRAY No. 14-968	Guilford (10CVD12467)	Reversed and Remanded
PAYTON v. BARNES TRANSP. No. 14-510	N.C. Industrial Commission (X67842)	Dismissed
SCHOTT v. STIWINTER No. 14-220	Buncombe (11CVS6168)	Reversed and Remanded
STATE v. BYRD No. 14-1087	Guilford (11CRS85093) (12CRS24017)	No Error
STATE v. CARTER No. 14-864	Randolph (12CRS53047)	No Error
STATE v. CLEMONS No. 14-745	Wake (12CRS217865)	No Error
STATE v. DEANS No. 14-1071	Wake (12CRS209176)	Affirmed
STATE v. GAUSE No. 14-1085	Mecklenburg (07CRS211736-38)	No Error in Part, Vacated and Remanded in Part.

STATE v. GUNTER No. 14-942	Haywood (10CRS359) (10CRS360) (10CRS362) (10CRS50204)	No prejudicial error
STATE v. HODGE No. 14-724	Buncombe (12CRS64155-56) (13CRS178-180) (13CRS323)	No prejudicial error
STATE v. ISTVAN No. 14-1027	Brunswick (13CRS3615) (13CRS701815)	No Error
STATE v. LONG No. 14-1217	Graham (11CRS50639)	No Error
STATE v. MORGAN No. 14-776	Gaston (11CRS66211) (11CRS66220) (11CRS66221)	Remanded for Resentencing
STATE v. RAVENELL No. 14-941	Iredell (09CRS60091) (09CRS60093) (10CRS1193) (10CRS59082)	Vacated and remanded.
STATE v. WASHINGTON No. 14-1183	Cabarrus (11CRS55611) (12CRS3)	No Error
STINES v. CARTER No. 14-59	Buncombe (13CVD2976)	Affirmed in part; reversed and remanded in part
VAN ANTWERP v. BILOBRAN No. 14-661	Pitt (12CVD596)	Affirmed

IN THE COURT OF APPEALS

A & D ENVTL. SERVS., INC. v. MILLER

[240 N.C. App. 296 (2015)]

A&D ENVIRONMENTAL SERVICES, INC., PLAINTIFF

v.

JOEL E. MILLER, DEFENDANT

No. COA14-913

Filed 7 April 2015

Venue—specified in non-compete agreement—statutorily required to be in county of residence

The trial court did not err in denying defendant's motion to dismiss for improper venue where plaintiff brought an action to enforce a non-compete agreement which specified venue. A forum selection clause which requires lawsuits to be prosecuted in a certain North Carolina county is enforceable only if the legislature has provided that said North Carolina county is a proper venue. The legislature has provided that this contract dispute must be tried in the county in which the plaintiff or defendant resides, but there is nothing in the record which shows that either party is a resident of Mecklenburg County for venue purposes.

Appeal by Defendant from order entered 6 June 2014 by Judge Richard L. Doughton in Guilford County Superior Court. Heard in the Court of Appeals 8 January 2015.

Graebe Hanna & Sullivan, PLLC, by M. Todd Sullivan and Mark R. Sigmon for Defendant-Appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James C. Adams, II, and Andrew L. Rodenbough for Plaintiff-Appellee.

DILLON, Judge.

Joel E. Miller ("Defendant") appeals from an order denying his motion to dismiss for improper venue pursuant to Rule 12(b)(3) of the Rules of Civil Procedure.¹ For the following reasons, we affirm.

I. Background

Plaintiff A&D Environmental Services, Inc., is a North Carolina corporation with its principal place of business in Guilford County. Plaintiff

1. Defendant also filed two notices of appeal regarding certain orders pertaining to a bond set by the trial court. However, Defendant has abandoned those appeals.

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provides environmental services to clients throughout North Carolina and other states.

Defendant, a resident of Orange County, was hired by Plaintiff in 2011. As a condition of employment, Defendant signed a non-compete, non-solicitation, confidentiality agreement (the “Agreement”). The Agreement contained a clause entitled “Applicable Law, Exclusive Venue, Consent to Jurisdiction” which contained the following language:

. . . . Moreover, any litigation under this Agreement shall be brought by either party exclusively in Mecklenburg County, North Carolina. . . . As such, the Parties irrevocably consent to the jurisdiction of the courts of Mecklenburg County, North Carolina (whether federal or state) for all disputes related to this Agreement. . . .

In 2014, Defendant resigned from Plaintiff and announced he was going to work for one of Plaintiff’s competitors.

Within a month of Defendant’s resignation, Plaintiff commenced this action in Guilford County Superior County to enforce its rights under the Agreement. Thereafter, Defendant moved to dismiss the action for improper venue pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) (2013), arguing that the Agreement required any action to be maintained in Mecklenburg County. Defendant’s motion was denied by the trial court. Defendant timely filed a notice of appeal from the order.

II. Jurisdiction

This appeal is interlocutory. However, as this Court has held that a denial of a motion to enforce a contract clause providing for exclusive venue affects a substantial right, *see, e.g., Cable Tel Servs., Inc. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 641, 574 S.E.2d 31, 33 (2002) (stating “North Carolina case law establishes firmly that an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantial right”), this appeal is properly before this Court.

III. Analysis

Defendant’s sole argument on appeal is that the trial court erred in denying his Rule 12(b)(3) motion to dismiss the action. For the reasons stated below, we hold that based on our Supreme Court’s opinion in *Gaither v. Charlotte Motor Car Co.*, 182 N.C. 498, 109 S.E. 362 (1921), we are compelled to affirm the decision of the trial court.

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In *Gaither*, the plaintiff filed a breach of contract suit in Richmond County, his county of residence. *Id.* at 498, 109 S.E. at 363. The defendant moved to transfer the action to Mecklenburg County based on a clause in the contract providing that any action “shall be brought in the city of Charlotte.” *Id.* Our Supreme Court affirmed an order of the trial court denying the defendant’s motion to transfer venue, stating that “the general policy of the courts is to disregard contractual provisions to the effect that an action shall be brought either in a designated court or a designated county to the exclusion of another court or another county in which the action, by virtue of a statute, might properly be maintained.” *Id.* at 499, 109 S.E. at 363. The Supreme Court based its holding on two separate grounds: First, the regulation of venue in North Carolina “is a matter within the discretion of the Legislature.” *Id.* That is, it is within the province of the Legislature to decide in which county or counties an action brought in North Carolina must be maintained; and parties cannot by stipulation strip the Legislature of this power. *Id.* at 500, 109 S.E. at 363-64. Second, parties cannot by stipulation strip a particular superior court of its *jurisdiction* – or legal right – to determine a particular action. *Id.*

In 1992, our Supreme Court affirmed the holding in *Gaither* based on the first ground described above – that parties could not by stipulation strip the Legislature of its power to determine which counties in North Carolina would be proper to maintain an action - stating that “[t]he *Gaither* decision is correct on its facts[.]” *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 143, 423 S.E.2d 780, 782 (1992). However, the Court disavowed *Gaither* to the extent that it could be read “to condemn forum selection clauses as depriving North Carolina courts of jurisdiction[.]” *Id.* at 144, 423 S.E.2d at 783. In holding that a forum selection clause which favored a court *in another State* was enforceable, our Supreme Court stated that its holding was not at odds with *Gaither*, but that *Gaither* was distinguishable: “There is a difference between attempting to fix the venue by contract within the State of North Carolina, where the North Carolina legislature provides for venue for all cases . . . , and attempting to fix the venue by contract in another state.” *Id.* at 143, 423 S.E.2d at 782.

In sum, our Supreme Court in *Perkins* recognized that its holding in *Gaither* is still good law. *Id.* (holding that “[t]he *Gaither* decision is correct on its facts”). Specifically, our Supreme Court in *Perkins* continued to recognize that parties may not strip our Legislature of its power to determine in which county or counties that actions maintained *in this State* must be prosecuted. Neither party cites, nor has our research

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uncovered, a case in which our Supreme Court has overruled its holding in *Gaither* as distinguished in *Perkins*. Therefore, we hold that a forum selection clause which requires lawsuits to be prosecuted in a certain North Carolina county is enforceable *only if* our Legislature has provided that said North Carolina county is a proper venue.

In the present action, Defendant seeks to enforce a contract provision requiring that lawsuits arising thereunder be prosecuted in Mecklenburg County. In this case, our Legislature has provided that this contract dispute “*must* be tried in the county in which the [Plaintiff] or [Defendant] . . . reside[s.]” N.C. Gen. Stat. § 1-82 (2013) (emphasis added). However, there is nothing in the record which shows that either party is a resident of Mecklenburg County for venue purposes. Regarding Defendant, the record discloses that he is a resident of Orange County. Regarding Plaintiff corporation, there is nothing in the record showing that it is a resident - for venue purposes - of Mecklenburg County. As a domestic corporation, Plaintiff is considered a resident of the county where it maintains its “registered or principal office” and also any county where it “maintains a place of business[.]” N.C. Gen. Stat. § 1-79(a)(1) and (2) (2013). Here, Defendant fails to point to any evidence in the record – and our search through the record has failed to find any such evidence – showing that Plaintiff maintains a place of business in Mecklenburg County; and, further, Defendant did not dispute Plaintiff’s assertion in its verified complaint that its principal place of business is in Guilford County. Therefore, we conclude that the trial court did not err in denying Defendant’s motion to dismiss based on improper venue.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

BANK OF N.Y. MELLON v. WITHERS

[240 N.C. App. 300 (2015)]

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS SUCCESSOR
TO JP MORGAN CHASE BANK NATIONAL ASSOCIATION AS TRUSTEE FOR
THE BENEFIT OF THE CERTIFICATE OF HOLDERS OF EQUITY ONE ABS, INC.
MORTGAGE PASS THROUGH CERTIFICATES SERIES 2003-2, PLAINTIFF

v.

JUNE WITHERS, CHARLES L. STEEL, IV, SOLELY IN HIS CAPACITY AS GUARDIAN OF
THE ESTATE OF JUNE WITHERS, RHONDA WITHERS, MARGARET YOUNG, ROBERT
YOUNG, SHELIA SMITH, FAYE KEARNEY, ROBERT KEARNEY, NORTH CAROLINA
DEPARTMENT OF REVENUE, BRANCH BANKING AND TRUST COMPANY AND HSBC
MORTGAGE SERVICES, INC., DEFENDANTS

No. COA14-1111

Filed 7 April 2015

Equity—subrogation—erroneous quitclaim deed

The trial court did not err by granting plaintiff’s motion for summary judgment to quiet title under the legal doctrine of equitable subrogation where June Withers was the sole owner of property; she and her daughter Rhonda sought a loan to refinance a prior deed of trust on the property, the new lender (PFS) required a quitclaim deed from June with June and Rhonda as joint tenants, and the closing attorney erroneously included June’s other daughters on the deed. The doctrine of equitable subrogation applied because land is unique and the remedies at law identified by defendants were inadequate.

Appeal by defendants from an order for summary judgment to quiet title under the doctrine of equitable subrogation entered 9 May 2014 by Judge Howard E. Manning, Jr. in Durham County Superior Court. Heard in the Court of Appeals 17 February 2015.

Ragsdale Liggett, by Dorothy Bass Burch and Ashley H. Campbell, for The Bank of New York Mellon, plaintiff-appellee.

Berman & Associates, by Gary K. Berman, for Margaret Young, Shelia Smith, and Faye Kearney, defendant-appellants.

CALABRIA, Judge.

In 2002, June (“June”) Withers was the sole owner of the property located at 121 West Cornwallis Road in Durham, NC (the “property”). At the time, June and her daughter, Rhonda (“Rhonda”) Withers, sought a home loan from Popular Financial Services (“PFS”) to refinance the prior

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deed of trust on the property from Accredited Home Lenders (“AHL”). To qualify for the loan, June and Wanda agreed to two conditions: (1) that PFS would have a first position lien on the property through a deed of trust executed by June and Rhonda Withers and (2) that June would execute a quitclaim deed with June as grantor and June and Rhonda as joint tenants. Accordingly, PFS instructed the closing attorney Natasha Newkirk (“Newkirk”) to prepare a deed with June as the grantor and June and Rhonda as joint tenants and to pay the prior deed of trust to AHL in full.

Newkirk prepared a quitclaim deed that not only included June and Rhonda as grantees, but also mistakenly included June’s three other daughters, Margaret Young (“Young”), Shelia Smith (“Smith”), and Faye Kearney (“Kearney”). Therefore, June conveyed an undivided interest to June, Rhonda, Young, Smith, and Kearney as tenants in common. On 10 January 2003, Newkirk recorded both the erroneous quitclaim deed and the deed of trust in Durham County. Therefore, June and Rhonda shared only a two-fifth interest in the property instead of the entire property. Newkirk, as directed by PFS, also paid the AHL deed of trust in full. PFS assigned the PFS deed of trust to the Bank of New York Mellon (“plaintiff”).

On 6 March 2012, plaintiff filed an action against the five tenants seeking, *inter alia*, to reform the deed of trust to include the portions of property held by Young, Smith, and Kearney so as to impose a constructive trust on the entirety of the property or, in the alternative, to equitably subrogate the deed of trust to the prior deed of trust held by AHL. June passed away on 28 December 2013. Rhonda executed a quitclaim deed to plaintiff transferring the entirety of her interest in the property, including any interest obtained following the passing of her mother, June. Therefore, the only remaining defendants were Young, Smith, and Kearney.

Plaintiff and the remaining defendants filed motions for summary judgment. After a hearing, the trial court denied plaintiff’s attempts to reform the deed of trust and to impose a constructive trust and granted defendants’ motions for summary judgment on those issues. At the same time, the trial court granted plaintiff’s motion for summary judgment to quiet title under the legal doctrine of equitable subrogation. Defendants appeal.

On appeal, defendants argue the trial court erred in granting summary judgment on the equitable subrogation claim for three reasons. First, defendants contend that plaintiff and defendants never agreed

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that Newkirk would use the funds to pay the prior deed of trust to AHL in full. Second, defendants maintain that plaintiff was not “excusably ignorant” of Newkirk’s mistake. Third, defendants claim plaintiff had an adequate remedy at law.

The standard of review for summary judgment is *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment will be upheld when the record indicates that there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007) (citations and quotations omitted).

Equitable subrogation is a

general rule [that] one who furnishes money for the purpose of paying off an encumbrance on real or personal property, at the instance either of the owner of the property or of the holder of the encumbrance, either upon the express understanding or under circumstances from which an understanding will be implied, that the advance made is to be secured by a first lien on the property, will be subrogated to the rights of the prior lienholder as against the holder of an intervening lien, of which the lender was excusably ignorant.

Peek v. Wachovia Bank & Trust Co., 242 N.C. 1, 15, 86 S.E.2d 745, 755 (1955). It applies “when one person has been compelled to pay a debt which ought to have been paid by another and for which the other was primarily liable.” *Trustees of Garden of Prayer Baptist Church v. Geraldco Builders, Inc.*, 78 N.C. App. 108, 114, 336 S.E.2d 694, 697–98 (1985) (citations omitted).

Equitable subrogation is based in equity and the purpose is “the doing of complete, essential, and perfect justice between all the parties without regard to form, and its object is the prevention of injustice.” *Journal Pub. Co. v. Barber*, 165 N.C. 478, 487–88, 81 S.E. 694, 698 (1914). “When the equities of a case favor equitable subrogation, the party in whose favor the right of subrogation exists is entitled to all of the remedies and security which the creditor had against the person whose debt was paid.” *Am. Gen. Fin. Servs., Inc. v. Barnes*, 175 N.C. App. 406, 409, 623 S.E.2d 617, 619 (2006) (citing *Trustees of Garden of Prayer Baptist Church*, 78 N.C. App. at 114, 336 S.E.2d at 698) (quotations omitted). The doctrine of equitable subrogation requires “both that the money should have been advanced for the purpose of discharging the prior encumbrance, and that [such money] should have actually been so applied.”

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Peek, 242 N.C. at 15–16, 86 S.E.2d at 756 (internal quotations and citations omitted).

In the present case, plaintiff's predecessor in interest, PFS, loaned June and Rhonda Withers \$63,425.00 to pay the prior deed of trust to AHL in full for the property at 121 West Cornwallis Road in exchange for a first position lien on that property. PFS provided the funds, directed the closing attorney to pay the prior deed of trust in full, and the closing attorney followed their directions regarding using the funds to pay the prior deed of trust to AHL in full. As part of the transaction, PFS required June to execute a quitclaim deed transferring the property to June and Rhonda as joint tenants. The closing attorney failed to follow PFS' instructions and mistakenly prepared the quitclaim deed with June as grantor and all three daughters, along with June and Rhonda, as joint tenants. When the closing attorney prepared the quitclaim deed, she directly contradicted PFS' instructions. As a result of this oversight, the deed of trust from PFS secured only two-fifths of the property, instead of the entire property. Since equity requires that the funds were advanced for the purpose of discharging the prior encumbrance, equity would not allow the attorney's mistake to defeat the agreed purpose of the transaction, which was to secure a loan by granting a first position lien on the property at 121 Cornwallis Road. Therefore, as a matter of law, the trial court correctly applied the doctrine of equitable subrogation to allow PFS, and its successor in interest, plaintiff, to an equitable subrogation of their rights to AHL to claim a first position lien on the entire property.

Defendants contend that despite satisfying all the requirements of equitable subrogation, plaintiffs should not receive an equitable benefit because there are adequate remedies at law. According to defendants, equity does not apply when the party seeking equity has a full and complete remedy at law. *Daugherty v. Cherry Hospital*, 195 N.C. 97, 102, 670 S.E.2d 915, 919 (2009) (citations and quotations omitted). As a general rule, "[e]quity supplements the law. Its office is to supply defects in the law where, by reason of its universality, it is deficient, to the end that rights may be protected and justice may be done as between litigants." *Town of Zebulon v. Dawson*, 216 N.C. 520, 522, 5 S.E.2d 535, 537 (1939). However, the remedies defendants identify are inadequate because of the failure to account for the unique nature of real property. According to the Supreme Court of North Carolina, "[l]and is an extremely important and long-valued asset in this state and throughout this country." *Powell v. City of Newton*, 364 N.C. 562, 572, 703 S.E.2d 723, 730 (2010) (Martin, J. concurring). In fact, "it has long been established, both in this state and throughout this country, that land is a special and unique

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asset” *Id.* at 573–74, 703 S.E.2d at 731 (Hudson, J. dissenting). Due to land’s unique nature, damage claims against individuals are an inadequate substitute for a first position lien on real property.

Since land is unique and the remedies at law identified by defendants are inadequate, the doctrine of equitable subrogation applies. Therefore, as a matter of law, the trial court correctly concluded that plaintiff was entitled to equitable subrogation. The trial court correctly granted summary judgment in favor of plaintiff since it was entitled to judgment as a matter of law and no issues of material fact existed. Accordingly, we affirm the trial court’s judgment.

Affirmed.

Judges McCullough and Dietz concur.

ASHLEY COMSTOCK, PLAINTIFF

v.

CHRISTOPHER COMSTOCK, DEFENDANT

No. COA14-731

Filed 7 April 2015

1. Appeal and Error—violation of multiple appellate rules—appeal dismissed

In an equitable distribution case, issues were dismissed for violation of the Appellate Rules where defendant did not argue that the trial court committed legal error and did not provide legal authority in support of his contentions. His arguments merely contained personal immunity, did not show prejudice, or raised a moot issue.

2. Divorce—equitable distribution—findings—evidentiary and ultimate

An equitable distribution order appropriately contained both “ultimate” and “evidentiary” findings necessary for appellate review of whether the property was equitably divided. The judgment was not fatally defective.

3. Divorce—equitable distribution—value of vehicle—de minimis error

The trial court’s valuation of a vehicle in an equitable distribution action remained undisturbed where defendant correctly argued

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that the trial court's finding of value was not supported by competent evidence but nonetheless failed to establish prejudicial error. The erroneous vehicle value was 0.6% of the adjusted value of the marital estate, which constituted a de minimis error.

4. Divorce—equitable distribution—brokerage account—marital property

The trial court did not err in an equitable distribution action by finding that a brokerage account was marital property. Defendant presented evidence tending to show that the brokerage account had some separate property attributes; however, competent evidence in the record supported the trial court's finding that the USAA Brokerage Account valued at \$85,670 was marital property. However, as defendant conceded in his brief, he was unable to trace the funds in this account back to the 2007 inherited funds because he "had forgotten to deposit the funds since the time [he] inherited the funds."

5. Divorce—equitable distribution—wedding ring—findings—supported by evidence—written finding prevails

Competent evidence in an equitable distribution action supported the trial court's finding that defendant kept the wedding ring after separation and had possession of the wedding ring at the time of trial. With regard to the conflict between the trial court's oral statement during trial and the trial court's order, the written finding of fact in the trial court's order controlled.

6. Divorce—equitable distribution—wedding ring—past orders—other competent evidence supporting finding

Although defendant argued in an equitable distribution appeal that the trial court erroneously overruled his objection to plaintiff's attorney's recitation of past orders to establish evidence of possession of the wedding ring, any such error was not prejudicial because it was already established that there was competent evidence supporting the trial court's finding that defendant had possession of the ring at the time of trial.

7. Divorce—equitable distribution—insurance policy—finding of stipulation—erroneous

The trial court erred in an equitable distribution action by finding that the parties stipulated that an insurance policy was marital property and by concluding that the policy value should be distributed to defendant. The parties did not stipulate that the policy was marital.

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8. Divorce—equitable distribution—home equity line of credit—defendant’s separate debt

The trial court did not err by finding that a home equity line of credit was defendant’s separate debt. The trial court’s finding on this issue was supported by competent evidence.

9. Divorce—equitable distribution—post-separation payments—mortgage and HOA dues

The trial court did not err by not crediting defendant with post-separation debt payments where defendant argued that the payments were used to keep property out of foreclosure due to plaintiff’s alleged limited or non-payment of HOA dues while she lived in the home. Plaintiff stated that she paid the monthly mortgage amount and the monthly HOA fees and that both were fully paid when she moved out of the house.

10. Divorce—equitable distribution—post-separation debt payment

The trial court was not required to consider a post-separation debt payment as a distributional factor in its equitable distribution order where defendant failed to carry his burden and did not show that he could receive credit or reimbursement for his payment under these circumstances. Defendant made no argument that the HOA payments were made toward a divisible or marital debt.

11. Divorce—equitable distribution—debt—women, gambling, alcohol—not for the joint benefit of the parties

The trial court did not err in an equitable distribution action by finding that a portion of the debt on two credit cards were defendant’s separate debt. Although defendant challenged the trial court’s methodology, he did not challenge the amount of the debt at separation. The trial court also found that the pro se defendant failed to meet his burden of showing that charges for “women,” “alcohol,” and “gambling” were for the joint benefit of the parties.

12. Divorce—equitable distribution—post-separation debt payments—source of funds

The trial court did not err by failing to make adequate findings of fact and conclusions of law about post-separation debt payments made by defendant. Fatal to defendant’s argument is that he claims he made post-separation payments from the USAA Investment Brokerage Account. Assuming that defendant in fact made the alleged post-separation payments, he failed to establish that the source of these payments was his separate funds.

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13. Divorce—equitable distribution—IRA—separate property—resource for distributive award

The trial court did not err by ordering that more than 50% of an IRA's value be awarded to plaintiff. The IRA was not a marital asset as the parties stipulated that it was defendant's separate property. However, defendant's IRA, a separate liquid asset, was available as a resource from which the trial court could order a distributive award.

14. Divorce—equitable distribution—attorney fees—defendant's failure to provide adequate support—findings—not a child support action

The trial court did not err by awarding attorney's fees to plaintiff where defendant argued that plaintiff failed to offer any competent evidence to suggest that defendant refused to provide support that was adequate under the circumstances. Because the attorney's fees were not awarded as a result of a child support action, the trial court was not required to make a finding that defendant refused to provide adequate support under the circumstances.

15. Divorce—equitable distribution—orders concerning an IRA—interlocutory

Defendant's appellate arguments concerning certain orders in an equitable distribution action were dismissed where there was no indication from the record that all of the claims brought by the parties had been resolved, thus making the orders interlocutory. Defendant did not articulate any argument that the domestic relations order or the injunction order affected a substantial right.

Appeal by defendant from orders entered 10 February 2014 and 7 March 2014 by Judge Ronald L. Chapman in Mecklenburg County District Court. Heard in the Court of Appeals 21 January 2015.

Krusch & Sellers, P.A., by Rebecca K. Watts, for plaintiff-appellee.

Christopher Comstock, Pro Se.

ELMORE, Judge.

Defendant appeals *pro se* from an injunction order freezing his IRA account, an equitable distribution order, and a domestic relations order. After careful consideration, we dismiss, in part; affirm, in part; and reverse, in part.

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I. Facts

Ashley Comstock (plaintiff) and Christopher Comstock (defendant) married on 6 May 2002 and separated on 10 June 2010. Plaintiff filed a complaint for divorce from bed and board, child custody, child support, equitable distribution, and attorney's fees on 17 June 2010. The parties divorced on 16 December 2011 by a Judgment of Divorce entered in Mecklenburg County.

On 27 November 2012 and 22 March 2013, the trial court heard evidence and arguments related to the equitable distribution of the parties' marital and divisible property. The property and debt at issue during the hearing and on appeal include: a 2009 Ford Expedition acquired during the marriage, a USAA Investments brokerage account ending in 3120 acquired during the marriage and in defendant's sole name, plaintiff's wedding ring stipulated as marital property, a USAA whole life insurance policy owned by the parties during the marriage, a home equity line of credit (HELOC) on the date of separation on marital property located at 7505 Torphin Court in Charlotte, post-separation payments made by defendant on marital property located at 9630 Blossom Hill Drive in Huntersville, debt acquired through a USAA Mastercard ending in 5755 and a USAA Rewards American Express card both in defendant's individual name, and a U.S. Trust IRA.

After hearing arguments of counsel, hearing testimony of the parties, and reviewing the court file and exhibits presented, the trial court ordered, in pertinent part, that defendant owed plaintiff a distributive award of \$137,762.65 and \$20,000 in attorney's fees related to plaintiff's claim for child custody.

II. Analysis**Issues #11, #13, #14, and #15**

[1] We first address in unison defendant's issues #11, #13, #14, and a portion of #15 on appeal. For the following reasons, we dismiss these issues.

Pursuant to North Carolina Appellate Procedure Rule 28(a)(6), "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. App. R. 28(b)(6). Accordingly, "it is the duty of appellate counsel to provide sufficient legal authority to this Court, and failure to do so will result in dismissal." *Moss Creek Homeowners Ass'n, Inc. v. Bissette*, 202 N.C. App. 222, 233, 689 S.E.2d 180, 187 (2010). This Court shall also dismiss issues,

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with few exceptions not applicable to the case at bar, if an appellant fails to preserve an issue for appellate review:

[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. App. R. 10(a)(1). Moreover, we generally dismiss "moot" issues. *See Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E.2d 33, 35 (1968). An issue is moot "[w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue[.]" *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978).

In the body of defendant's argument relating to issue #11 on appeal, he states, "[t]o add insult to injury, the trial court allowed [p]laintiff's trial attorney to essentially interject his belief of how debt should be classified in equitable distribution cases and how the trial court's evidentiary standards should be determined according to misplaced case law[.]" Defendant does not argue that the trial court committed legal error, he does not provide any legal authority in support of his contention, and his purported argument merely articulates his distaste towards the conduct of plaintiff's trial attorney.

In issue #13, defendant argues that the delayed entry of the equitable distribution order prejudiced him. However, defendant points to absolutely no legal authority in support of his contention. He entirely fails to set forth the relevant standard of review and legal authority for determining whether a trial delay constitutes error. Defendant's argument merely contains his personal opinion about the delayed entry of the equitable distribution order and is devoid of any legal reasoning. Moreover, he fails to make any argument to show how the delay affected the outcomes of the findings or conclusions in the trial court's equitable distribution order. *See Wall v. Wall*, 140 N.C. App. 303, 314, 536 S.E.2d 647, 654 (2000).

In issue #14, defendant argues that the trial court erred by denying his presentation of evidence during the injunction and final equitable distribution trial hearing on 7 February 2014. However, defendant failed to preserve this issue for appellate review.

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Defendant points us to the following colloquy in support of his position that the trial court erred by denying his presentation of evidence:

DEFENDANT: Well, Your Honor, as I also have delineated in the email, there is a substantial equity in the marital, former marital home.

THE COURT: Okay. And as I said in my response, saying about all (unintelligible), I can't do that because I'm bound by the evidence.

DEFENDANT: Are you not accepting evidence today, Your Honor?

THE COURT: No, we're finished with the evidence.

DEFENDANT: Okay.

THE COURT: We're just determining the wording of my judgment at this point[.]

It is clear from the colloquy above that defendant never objected to the trial court's ruling that he could not present any further evidence. Moreover, after reviewing the remaining portion of the 7 February 2014 hearing, defendant failed to make any objection related to the presentation of evidence.

The second portion of defendant's issue #15 relates to the trial court's alleged error by "grossing up" the award to plaintiff of \$137,762.65 to \$185,979.58 due to the early withdrawal penalty and taxation on the IRA proceeds. Although the equitable distribution order provided for a "grossing up" of the distributive award, the trial court entered an Amended Domestic Relations Order on 12 August 2014, which ordered a transfer of \$157,762.65 from defendant's IRA to plaintiff. This amount represents the \$137,762.65 distributive award and \$20,000 in attorney fees. Thus, the "grossing up" amount was never included in the actual transfer of funds. As such, even if the trial court erred by "grossing up" the distributive award in the equitable distribution order, the issue is moot at this point in light of the superseding Amended Domestic Relations Order.

For the foregoing reasons, we dismiss issues #11, #13, #14, and a portion of #15 on appeal.

Issue #1: The Equitable Distribution Judgment

[2] First, defendant argues that the trial court's equitable distribution judgment is fatally defective because many of the findings contain "evidentiary" facts rather than "ultimate" facts. We disagree.

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In equitable distribution actions, the trial court must conduct a three-pronged analysis: “(1) identify the property as either marital, divisible, or separate property after conducting appropriate findings of fact; (2) determine the net value of the marital property as of the date of the separation; and (3) equitably distribute the marital and divisible property.” *Mugno v. Mugno*, 205 N.C. App. 273, 277, 695 S.E.2d 495, 498 (2010).

Moreover, a trial court must “make written findings of fact that support the determination that the marital property and divisible property has been equitably divided.” N.C. Gen. Stat. § 50-20(j) (2013). Findings of fact can be “ultimate” or “evidentiary” in nature. *Smith v. Smith*, 336 N.C. 575, 579, 444 S.E.2d 420, 422-23 (1994) (citation and quotation marks omitted). “Ultimate facts are the final facts required to establish the plaintiff’s cause of action or the defendant’s defense; and evidentiary facts are those subsidiary facts required to prove ultimate facts.” *Id.* (citation and quotation marks omitted). A trial court’s order

does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts[.] [I]t does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

Williamson v. Williamson, 140 N.C. App. 362, 364, 536 S.E.2d 337, 338-39 (2000) (citation and quotation marks omitted).

Here, the “ultimate” facts are facts that address the requirements of the three-pronged analysis: identification of the property as marital, divisible, or separate, a determination of the date of separation value of the property, and a determination of the distribution of the property. The “evidentiary” facts are facts upon which the “ultimate” facts regarding classification, value, and distribution are based.

The equitable distribution order in this case appropriately contains both “ultimate” and “evidentiary” findings necessary for us to review whether the property was equitably divided. Accordingly, defendant’s argument fails because the equitable distribution judgment is not “fatally defective.” See *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982) (“[P]roper finding of facts requires a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment.”).

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Issue #2: 2009 Ford Expedition

[3] Defendant argues that the trial court's finding of fact #12 that the 2009 Ford Expedition had a net value of \$11,890 was not supported by competent evidence. While we agree with defendant, he has failed to establish any prejudicial error.

"In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); see also *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) ("'[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.'" (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))).

Stipulations are judicial admissions and are binding upon the parties absent well-established exceptions not relevant to the present case. *Quesinberry v. Quesinberry*, 210 N.C. App. 578, 582, 709 S.E.2d 367, 371 (2011). "A stipulated fact is not for the consideration of the jury, and the jury may not decide such fact contrary to the parties' stipulation." *Smith v. Beasley*, 298 N.C. 798, 801, 259 S.E.2d 907, 909 (1979). In a non-jury trial, a trial court "acts as both judge and jury, thus resolving any conflicts in the evidence." *Matter of Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996).

During the marriage, the parties acquired a 2009 Ford Expedition. The trial court classified the vehicle as marital property. In the Final pre-trial Order, the parties stipulated that the vehicle should be distributed to defendant. The trial court was also bound by the parties' stipulation that the loan balance on the vehicle was \$21,235.05. Instead, the trial court's loan balance value in its order is \$19,560. The trial court calculated the vehicle's net value of \$11,890 to be distributed to defendant by taking the date of separation value of \$31,450 (Kelley Blue Book value presented by plaintiff) less the unstipulated loan amount of \$19,560. Had the stipulated loan amount been used in the calculation, the net value to be distributed to defendant for the vehicle would have been \$10,214.95, resulting in a difference of \$1,675.05.

The trial court found the total marital estate to be \$286,229.30 (\$280,877.30 distributed to defendant + \$5,352 to plaintiff). A reduction

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in defendant's distribution by \$1,675.05 would have changed the marital estate's value to \$284,554.25 (\$279,202.25 distributed to defendant + \$5,352 to plaintiff). The \$1,675.05 value is 0.6% of the adjusted value of the marital estate, which constitutes a *de minimis* error. As such, the trial court's erroneous calculation does not warrant reversal. However, because we reverse and remand this matter on issue #6, the trial court should also correct and apply this finding on remand. *See Dechkovskaia v. Dechkovskaia*, __ N.C. App. __, __, 754 S.E.2d 831, 835 (2014), *review denied*, __ N.C. App. __, __, 758 S.E.2d 870 (2014) (holding that for a marital estate worth \$591,702, a \$5,000 calculation error in the value of the marital residence was *de minimis*).

Defendant also argues that the trial court assigned an erroneous fair market value to the vehicle of \$31,450 because it based this figure on plaintiff's testimony of the "Kelley Blue Book valuation with the incorrect model year, accessories, condition, and mileage inputs. [Defendant] provided a valuation of \$28,170[.]" We disagree.

In making findings of fact, "[t]he fact that the trial judge believed one party's testimony over that of the other and made findings in accordance with that testimony does not provide a basis for reversal in this Court." *Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986).

Defendant essentially asks this Court to re-weigh the evidence on appeal, which we are unable to do. Competent evidence presented by plaintiff showed that the Kelley Blue Book value of the vehicle at the date of separation was \$31,450. *See State v. Dallas*, 205 N.C. App. 216, 220, 695 S.E.2d 474, 477 (2010) (holding that "the use of the Kelley Blue Book for determining the value of [vehicles]" is admissible). Nothing in the record indicates that plaintiff relied on a value based on the incorrect vehicle and inputs. Accordingly, the trial court's valuation of the vehicle will remain undisturbed.

Issue #3: USAA Investments Brokerage Account

[4] Next, defendant argues that the trial court erred by finding that the USAA Brokerage Account ending in 3120 and valued at \$85,670 was marital property. We disagree.

"[T]he distribution of marital property is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion." *O'Brien v. O'Brien*, 131 N.C. App. 411, 416, 508 S.E.2d 300, 304 (1998). The equitable distribution process requires that the trial court initially classify all of the distributable property as either marital, separate, or divisible. N.C. Gen. Stat. § 50-20(a) (2013). Marital property

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includes “all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties.” *Simon v. Simon*, __ N.C. App. __, __, 753 S.E.2d 475, 478 (2013) (citation and quotation marks omitted). Separate property includes:

all real and personal property acquired by a spouse before marriage or acquired by a spouse by devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance.

N.C. Gen. Stat. § 50-20(b)(2) (2013). The party seeking to classify the property as marital must show by a preponderance of the evidence “that the property: (1) was acquired by either spouse or both spouses; and (2) was acquired during the course of the marriage; and (3) was acquired before the date of the separation of the parties; and (4) is presently owned.” *Langston v. Richardson*, 206 N.C. App. 216, 220, 696 S.E.2d 867, 871 (2010) (citation and quotation marks omitted). If the party meets this burden, the opposing party seeking to show that the property is separate must then prove by a preponderance of the evidence

that the property was: (1) acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage (third-party gift provision); or (2) acquired by gift from the other spouse during the course of marriage and the intent that it be separate property is stated in the conveyance (inter-spousal gift provision); or (3) was acquired in exchange for separate property and no contrary intention that it be marital property is stated in the conveyance (exchange provision).

Id. at 220-21, 696 S.E.2d at 871 (citation and quotation marks omitted). Here, there is no dispute that the account was acquired by defendant in 2007, during the marriage, and that it was in existence at the time of separation. Thus, the dispositive question is whether the trial court erred by ruling that defendant did not meet his burden of showing that the account was separate property.

Upon a review of the record, defendant presented evidence tending to show that the brokerage account had some separate property attributes. He testified that the funds in that account were inherited from his mother. He also recalled establishing the account with the inherited

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funds and always kept the inherited funds in a separately held account in his own name (the account at issue here was in defendant's name only).

However, as defendant concedes in his brief, he was unable to trace the funds in this account back to the 2007 inherited funds because he "had forgotten to deposit the funds since the time [he] inherited the funds[.]" Evidence at trial established that defendant cashed two checks for the inherited funds within three days prior to 3 July 2007 and 18 January 2008 for \$113,409.48 and \$3,402.47, respectively. The funds in the account appear to stem from deposits made during the course of 2008, with the first deposit being made 29 January 2008 for \$52,000.

Accordingly, competent evidence in the record supports the trial court's finding that the USAA Brokerage Account ending in 3120 and valued at \$85,670 was marital property. *See Minter v. Minter*, 111 N.C. App. 321, 329, 432 S.E.2d 720, 725 (1993) ("[A]n equitable distribution order will not be disturbed unless the appellate court, upon consideration of the cold record, can determine that the division ordered . . . has resulted in a[n] obvious miscarriage of justice.").

Issue #4: The Wedding Ring

[5] Defendant challenges the trial court's distribution of the wedding ring, arguing that 1.) no credible evidence was offered to support the finding that defendant had possession of the ring and 2.) the finding was incongruent with the trial court's oral statement during trial that no sufficient evidence supported a finding that defendant took the ring. We disagree. We initially note that defendant does not dispute that plaintiff's wedding ring is marital property valued at \$5,000.

After reviewing the record, competent evidence supported the trial court's finding that defendant kept the ring after separation and had possession of the wedding ring at the time of trial. Plaintiff testified that on 1 September 2010, she placed the ring in a jewelry box under the sink in her bathroom. While she was out of the house that day, defendant entered her residence and removed items from the house. When plaintiff returned to the residence, she checked the jewelry box and found that the ring was missing. As of the trial date, plaintiff had not located the ring. Thus, defendant's argument fails.

With regard to the conflict between the trial court's oral statement during trial that no sufficient evidence supported a finding that defendant took the ring and the trial court's order finding that defendant "kept the ring and said ring was in [defendant]'s possession at the time of trial", the written finding of fact in the trial court's order controls.

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The trial court initially made its oral statement on the first day of trial, before all of the evidence was presented and issues were ruled upon. Later at trial, evidence was presented that brought into question defendant's credibility. After weighing the credibility of the witnesses and the evidence in totality, the trial court entered a final order reflecting its findings. Defendant essentially attempts to appeal from the trial court's oral ruling, which is impermissible under the circumstances of this case. *See In re Hawkins*, 120 N.C. App. 585, 587, 463 S.E.2d 268, 270 (1995) (holding that the trial court had not entered a final order from which an appeal could be taken when it made an oral ruling during trial because it had not ruled on all issues); *see also* N.C. R. Civ. P. § 1A-1, Rule 58 (2013) ("[J]udgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court."). Accordingly, we overrule defendant's argument on appeal.

Issue #5: "Testimony" of Plaintiff's Attorney

[6] Next, defendant argues that the trial court erroneously overruled his objection to plaintiff's attorney's recitation of past orders to establish evidence that defendant had possession of the wedding ring in violation of North Carolina Civil Procedure Rule 46. We disagree.

Even accepting defendant's argument as true, such error was not prejudicial because we have already established above that plaintiff's testimony provided competent evidence in support of the trial court's finding that defendant had possession of the ring at the time of trial, notwithstanding the alleged conduct of plaintiff's trial attorney. Accordingly, defendant's argument fails.

Issue #6: USAA Whole Life Insurance Policy

[7] Defendant also argues the trial court erred in finding that the parties stipulated that the USAA Whole Life Insurance policy was marital property and by concluding that the policy value should be distributed to defendant. We agree.

After reviewing the record, the parties did not stipulate that the policy was marital. The parties offered conflicting testimony on this issue and defendant contended that the policy was separate. Because the purported stipulation was the only finding in support of the trial court's distribution of the policy to defendant as marital property in the amount of \$32,428, the distribution was also made in error. Accordingly, we reverse these portions of the order (finding of fact #33 and conclusion of law #9a) and remand to the trial court to: 1.) consider the evidence presented

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with regard to the policy, 2.) classify the policy as marital, separate, or divisible, and 3.) distribute the policy value accordingly.

Issue #7: Home Equity Line of Credit (HELOC)

[8] Next, defendant argues that the trial court erred in its finding that the HELOC was defendant's separate debt. We disagree.

Marital debt is "one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Becker v. Becker*, 127 N.C. App. 409, 414, 489 S.E.2d 909, 913 (1997) (citation and quotation marks omitted). The party claiming that debt is marital carries the burden of proof to show "the value of the debt on the date of separation and that it was incurred during the marriage for the joint benefit of the husband and wife." *Id.* at 415, 489 S.E.2d at 913. (citation and quotation marks omitted)

Here, defendant alleged the HELOC was marital debt. There is no dispute that the HELOC existed on the date of separation in the amount of \$38,938. Thus, the dispositive issue is whether defendant met his burden of showing that the debt was for the joint benefit of the parties. Defendant testified that plaintiff was aware of the HELOC and

[w]e basically used them to live and build stuff around the house. I mean, we spent a lot of money at Lowe's, I fixed things the way she wanted them, working around the house, in the yard. . . . [I]t was spent around the house. . . . [We] built a tree house for the boys in the back yard[.]

However, plaintiff testified that she was never aware that defendant acquired the HELOC, never signed the paperwork on the HELOC, and she only learned about the debt after they separated. She further testified that she did not know for what purpose defendant used the HELOC money.

After weighing the credibility of the parties' testimony, the trial court, in its discretion, ultimately concluded that defendant failed to meet his burden and ruled that the debt was separate. The trial court's finding on this issue was supported by competent evidence. Thus, the trial court did not err by finding that the debt was separate.

Issue #8: Alleged Post-Separation Debt Payments Associated with Blossom Hill Drive Property

[9] Next, defendant argues that the trial court erred by failing to credit defendant with post-separation debt payments made in the amount of

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\$5,334. His argument hinges on the premise that the post-separation debt payments were used to keep the property at 9630 Blossom Hill Drive out of foreclosure due to plaintiff's alleged limited or non-payment of HOA dues from July 2010 until March 2012 while she lived in the home. Accordingly, defendant challenges the trial court's finding that when plaintiff lived in the home, she "paid the . . . HOA dues . . . for the home" as being unsupported by competent evidence.

However, plaintiff testified that in August 2009 the couple purchased the Blossom Hill Drive property. On the date of separation (10 June 2010) they both lived at that address, but after separation plaintiff lived there until 15 March 2012. From 10 June 2010 until 15 March 2012 plaintiff stated that she paid the monthly mortgage amount of \$980 and the monthly HOA fees of \$110 and that the mortgage and HOA fees were fully paid when she moved out of the house. Thus, defendant's argument fails.

[10] Defendant also argues that the trial court made inadequate findings regarding his post-separation debt payment of \$5,334 to repurchase the property from HOA lien foreclosure. He contends that the trial court was required to give defendant a dollar for dollar credit in the division of the property, order that plaintiff reimburse defendant, or treat his payments as distributional factors. We disagree.

"The trial court is required to consider all debts of the parties in determining an equitable distribution." *Edwards v. Edwards*, 110 N.C. App. 1, 12-13, 428 S.E.2d 834, 839 (1993). "If the debt is marital, the court has discretion to apportion or distribute the debt in an equitable manner." *Id.* at 13, 428 S.E. 2d. at 839.

Although the trial court found that "in or about February 2013 [defendant] made a payment of \$5,334 to repurchase said property from the homeowner's association[,] there is no finding to indicate how or whether it considered those payments in equitable distribution. The trial court found that:

the home should be distributed to [defendant]. . . . [T]he Court values said home at \$0 due to the pending foreclosure proceedings. . . . [T]he Court is also valuing the debt associated with the home at \$0 because it appears as though said debt will be discharged in the foreclosure and neither party will actually pay said debt.

However, the trial court was not required to make findings related to its consideration of the \$5,334 payment in its equitable distribution order. It is undisputed that the outstanding HOA fees owed to the HOA

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were for the time period on and after March 2012, which was after the date of the parties' separation. Defendant makes no argument that the HOA payments were made towards a divisible or marital debt. Because defendant failed to carry his burden, the trial court was not required to consider the \$5,334 payment as a distributional factor in its equitable distribution order.

Moreover, defendant has failed to show that he can receive credit or reimbursement for his payment under these circumstances. *See id.* at 11, 428 S.E.2d at 839. ("Defendant does not argue that these [expenses] were marital debts, so she is not entitled to credit on that ground."). Thus, defendant's argument fails.

Issues #9, #10: Credit Card Debt

[11] Defendant's next arguments are interrelated and will thus be discussed in unison. Defendant argues that the trial court erred in finding that a portion of the debt in USAA MasterCard credit card debt account ending in 5755 and a USAA Rewards American Express credit card debt account ending in 4791 were defendant's separate debt. We disagree.

During the marriage, defendant acquired debt with the MasterCard (which was in his individual name). Although defendant challenges the methodology by which the trial court classified the MasterCard debt as marital or separate, he does not challenge the total balance of the debt at the date of separation being \$13,101 or the charged amounts found on Plaintiff's Exhibit 33, which is a spreadsheet that was offered during trial to show credit card charges by defendant purportedly used for "women[,] including websites, dating, hotels, strip clubs (\$11,652.78); "alcohol" (\$1,377.49), "cigars," and "gambling."

After reviewing the specific nature of the charges, the trial court found that defendant failed to meet his burden of proving that the charges related to "women" and "alcohol" were incurred for the joint benefit of the parties. Thus, it found that \$13,030.27 was defendant's separate debt on the MasterCard.

Similarly, with regard to the American Express credit card debt, the card was in defendant's individual name. The uncontested date of separation balance on the card was \$14,536. Plaintiff's Exhibit 34 was a spreadsheet that listed the same categories of charges incurred by defendant in Exhibit 33. The trial court found, without dispute, that the amounts allocated to "women" were \$1,749.56 and \$2,787 to "gambling[,] respectively. The trial court once again determined that defendant failed to meet his burden to establish that these two categories

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were for the joint benefit of the parties and accordingly classified them as defendant's separate debt totaling \$4,536.56.

As previously discussed, because defendant sought to classify the credit card debt as marital, he carried the burden of proof at trial on this issue. The trial court as the finder of fact had the authority to believe none, some, or all of the parties' testimony. After considering the evidence presented by plaintiff and defendant, the trial court, within its discretion, concluded that defendant failed to meet his burden of proof to establish that the portions of the MasterCard and American Express credit card debt were marital. Defendant has also failed to provide any legal authority to demonstrate that the trial court abused its discretion in making such determinations. Thus, his arguments fail.

Issue #12: Other Alleged Post-Separation Debt Payments

[12] Next, defendant argues that the trial court erred by failing to make adequate findings of fact and conclusions of law regarding \$76,981 in post-separation debt payments made by defendant. Defendant contends that he made post-separation payments of \$59,790 for Trophin Court mortgage payments, payments on a HELOC secured on that property (\$3,000), HOA fees associated with that property (\$1,170), and two credit card accounts (\$13,021). He further claims that he paid these post-separation debts from the USAA Investment Brokerage Account ending in 3120. As such, he avers that the trial court was required to give defendant a dollar for dollar credit in the division of the property, order that plaintiff reimburse defendant, or treat his payments as distributional factors. We disagree.

"A spouse is entitled to some consideration, in an equitable distribution proceeding, for any post-separation payments made by that spouse (*from non-marital or separate funds*) for the benefit of the marital estate." *Shope v. Pennington*, __ N.C. App. __, __, 753 S.E.2d 688, 690 (2014) (citation and quotation marks omitted). A defendant is not entitled to credit "for those payments toward marital debt if those payments were made using marital funds." *Id.*

Fatal to defendant's argument is that he claims he made post-separation payments from the USAA Investment Brokerage Account. The trial court found, and we agreed, in issue #3 above, that this account was marital property. Thus, assuming *arguendo* that defendant in fact made the alleged post-separation payments, he has nevertheless failed to establish that the source of these payments was from his separate funds. Accordingly, the trial court was not required to give defendant

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credit for his alleged post-separation payments in the equitable distribution proceeding. Thus, defendant's argument fails.

Issue #15: U.S. Trust IRA

[13] Defendant argues that the trial court erred by ordering that more than 50% of the U.S. Trust IRA's value be awarded to plaintiff in violation of N.C. Gen. Stat. § 50-20.1 (2013). We disagree.

In relevant part, the trial court found:

32. [Defendant] is the owner of a U.S. Trust IRA which consists of funds that [he] inherited from his parents. The date of separation value of said IRA was \$234,987. The parties have stipulated, and the Court so finds, that said IRA is [defendant's] separate property.

According to the provisions of N.C. Gen. Stat. § 50-20, "the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section." N.C. Gen. Stat. § 50-20 (2013). Thus, the trial court must distribute the marital and divisible property. *Id.* Accordingly, N.C. Gen. Stat. § 50-20.1 contemplates the equitable distribution of those marital portions of pension and retirement benefits. The statute restricts a trial court from awarding a party more than 50% of the marital portion of the earning party's benefits with some limited exceptions. N.C. Gen. Stat. § 50-20.1.

Here, the U.S. Trust IRA was not a marital asset as the parties stipulated that it was defendant's separate property. As such, it was not subject to division through equitable distribution, and the restrictions in N.C. Gen. Stat. § 50-20.1 do not apply. However, defendant's U.S. Trust IRA, a separate liquid asset, was available as a resource from which the trial court could order a distributive award. *See Sauls v. Sauls*, __ N.C. App. __, __, 763 S.E.2d 328, 331-32 (2014). Thus, defendant's argument fails.

Issue #16: Attorney's Fees

[14] Defendant argues that the trial court erred by awarding attorney's fees to plaintiff because plaintiff failed to offer any competent evidence to suggest that defendant refused to provide support that was adequate under the circumstances. We disagree.

In relevant part, pursuant to N.C. Gen. Stat. § 50-13.6 (2013), the trial court in a proceeding for custody or support "may in its discretion order payment of reasonable attorney's fees to an interested party acting

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in good faith who has insufficient means to defray the expense of the suit.” However,

[b]efore ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney’s fees to an interested party as deemed appropriate under the circumstances.

Id. Here, the trial court ordered defendant to pay a portion of plaintiff’s attorney’s fees related to her successful child custody claim. The trial court found that “[plaintiff] is an interested party acting in good faith who does not have sufficient means to defray the expense of this action and is entitled to an award of attorney’s fees to be paid by [defendant]” for “fees related to her claim for child custody[.]” Because the attorney’s fees were not awarded as a result of a child support action, the trial court was not required to make a finding that defendant refused to provide adequate support under the circumstances. Thus, defendant’s argument fails.

Issues #17, #18: Injunction/Order Freezing Defendant’s IRA Account and Domestic Relations Order

[15] Finally, defendant’s issues #17 and #18 relate to alleged errors arising from the trial court’s order entitled “injunction/order freezing defendant’s IRA account” and the domestic relations order. However, defendant’s appeal from the injunction order and domestic relations order are interlocutory. Although N.C. Gen. Stat. § 50-19.1 (2013) allows for a party to appeal from an order “adjudicating a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution” despite the pendency of other claims in the same action, an injunction order and domestic relations order are not included on the list of immediately appealable interlocutory orders. *See* N.C. Gen. Stat. § 50-19.1.

There is no indication from the record that all of the claims brought by the parties have been resolved, thus making the orders in question interlocutory. Defendant does not articulate any argument that the domestic relations order or the injunction order affects a substantial right. Thus, we dismiss these issues on appeal.

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Assuming *arguendo* that defendant's appeal from the injunction order and the domestic relations order is properly before this Court, his argument nevertheless fails. Defendant argues that because the equitable distribution order is fatally defective, the trial court's subsequent injunction order and domestic relations order constitute reversible error. However, we previously ruled in issue #1 that the equitable distribution order is not fatally defective. Thus, defendant cannot prevail on this issue.

III. Conclusion

In sum, we dismiss defendant's issues #11, #13, #14, and a portion of #15. We also dismiss defendant's appeal as it pertains to issues #17 and #18 because they arise from the injunction order and domestic relations order, which are both interlocutory.

We reverse the equitable distribution order as it relates to the USAA Whole Life insurance policy (issue #6) and remand for classification and appropriate distribution. We also remand to correct the loan balance value of the 2009 Ford Expedition (issue #2) on the order. Finally, we affirm all other portions of the equitable distribution order to the extent that they remain unaffected by our rulings with regard to issues #2 and #6.

Dismissed, in part; affirmed, in part; reversed, in part.

Judges DAVIS and TYSON concur.

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THE ESTATE OF NATHAN RICHARD COPPICK, BY ITS ADMINISTRATOR
RICHARD G. COPPICK, PLAINTIFF

v.

HOBBS MARINA PROPERTIES, LLC; HOBBS WESTPORT MARINA, LLC;
CHAMPIONSHIP CHARTERS, INC.; JOSEPH CLIFTON CHAMPION; AND PETROLEUM
EQUIPMENT & SERVICE, INC., DEFENDANTS

No. COA14-127

Filed 7 April 2015

1. Negligence—explosion while fueling boat—negligence per se

The trial court did not err where defendant argued that plaintiff failed to prove the elements of negligence and the trial court denied defendant's motion for judgment notwithstanding the verdict. Where there is a violation of a safety statute, the traditional role of the jury in determining whether a plaintiff has set forth a prima facie case of negligence is superseded, and defendant-violator is considered to be negligent as a matter of law, or negligent *per se*. In the instant case, the specific activity subject to regulation by the Fire Prevention Code was the use of certain gasoline nozzles containing a hold-open latch at a marina.

2. Negligence—explosion while fueling boat—proximate cause

In an action arising from an explosion at a marina while a boat was refueling, plaintiff put forth sufficient evidence, direct and circumstantial, as to the cause or origin of the explosion. The test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant. Expert testimony is not required to establish the cause or origin.

3. Negligence—explosion at marina—negligence per se—evidence sufficient

In an action arising from an explosion at a marina while a boat was refueling, the trial court did not err by instructing the jury on negligence and negligence *per se*. While defendant contends it presented sufficient evidence of the negligence of others to support giving the instruction on insulating negligence, the Court of Appeals was unable to find any conduct that superseded the original conduct of defendant where such conduct constituted a violation of a safety statute and proximately caused the death of the victim.

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4. Negligence—explosion while fueling a boat—no cumulative error

In an action arising from an explosion and fire at a marina, there was no evidence in the record that the trial court's rulings resulted in confusion of the jury or undue prejudice to defendant such that a new trial was required.

5. Damages and Remedies—interest—basis of calculation

The trial court did not err in its award of prejudgment interest based on the full amount of compensatory damages awarded, \$1,500,000.00. Although defendant contended that prejudgment interest should be calculated based only on the portion of compensatory damages for which defendant is responsible, the trial court's calculation was in accordance with the formula espoused by the North Carolina Supreme Court in *Brown v. Flowe*, 349 N.C. 520.

Appeal by defendant Petroleum Equipment and Service, Inc., from judgment entered 11 April 2013 by Judge Forrest D. Bridges in Lincoln County Superior Court. Heard in the Court of Appeals 12 August 2014.

Sigmon, Clark, Mackey, Hutton, Hanvey & Ferrell, PA, by Forrest A. Ferrell and Jason White, Weaver, Bennett & Bland, P.A., by Michael David Bland, and Kennedy & Wulforst, P.A., by D. Todd Wulforst, for plaintiff-appellee.

Horack, Talley, Pharr & Lowndes, P.A., by Kimberly Sullivan, for defendant-appellant.

BRYANT, Judge.

Where the evidence was sufficient to support the jury verdict finding that the death of Nathan Coppick was caused by defendant's negligence and properly based on the doctrine of negligence *per se*, we find no error in the trial court's denial of defendant's motion for judgment notwithstanding the verdict or new trial. We also find no error in the trial court's assessment of interest on the compensatory damage award in accordance with North Carolina General Statutes, section 24-5.

On 27 March 2013, a jury trial commenced in Lincoln County Superior Court, the Honorable Forrest Donald Bridges, Judge presiding. Plaintiff, The Estate of Nathan Richard Coppick, by its Administrator Richard G. Coppick, had filed suit alleging negligence against defendants Hobbs Marina Properties, LLC; Hobbs Westport Marina, LLC;

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Championship Charters, Inc.; Joseph Clifton Champion; and Petroleum Equipment & Service, Inc. Prior to trial, plaintiff voluntarily dismissed its claim against defendants Championship Charters, Inc., and Joseph Clifton Champion. The record is silent as to the outcome of the proceedings against Hobbs Marina Properties, LLC, and Hobbs Westport Marina, LLC. But, at trial, the only defendant plaintiff proceeded against was Petroleum Equipment & Service, Inc. (hereinafter “defendant”).

The evidence at trial tended to show that on 10 June 2008, Nathan Coppick was working at the Hobbs Westport Marina in Denver, North Carolina. Shortly before four o’clock that afternoon, the Championship II, an eighty-foot-long charter vessel with two fuel tanks (one twenty gallon tank, one ten gallon tank) was positioned at Hobbs Westport Marina for refueling. The gas pump was activated, and recorded video surveillance admitted as substantive evidence and played for the jury showed Nathan pulling a gasoline hose toward the gasoline receptacle located at the rear of the Championship II. Nathan then walked away from the gasoline receptacle and headed toward the front of the boat. According to the clock shown on the recorded video surveillance, after six minutes had elapsed, a vapor cloud was visible on the port side of the vessel in “real close proximity” to the fueling area. Then there were two explosions. The first explosion occurred as Nathan was stepping off a ladder from the second deck onto the center of the stern (the back of the boat). When the second explosion occurred, fire engulfed the stern of the Championship II. Nathan was killed instantly.

Evidence showed that defendant provided the fuel dispensing system equipment, including nozzles, used at the marina. The nozzle on the hose Nathan used to refuel the Championship II was a non-pressure-activated nozzle with a hold-open latch. Richard Strickland, Chief Fire Code Consultant with the North Carolina Department of Insurance, Office of State Fire Marshal, and Rebecca Warr, Safety Compliance Officer with the North Carolina Department of Labor, testified that use of gasoline nozzles with a hold-open latch at a marina was a violation of the North Carolina Fire Code and OSHA regulations.

The jury found defendant negligent and liable for Nathan Coppick’s death. The jury awarded plaintiff \$1,500,000.00, and the trial court entered judgment in accordance with the jury award. Defendant filed a motion for judgment notwithstanding the verdict (JNOV) or, in the alternative, a motion for a new trial. The trial court denied the motion. Defendant appeals.

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In its appeal from the denial of its motion for JNOV and alternatively, new trial, defendant contends the trial court erred in denying the motion. Defendant also challenges the trial court's instructions on negligence and negligence *per se*, the trial court's failure to instruct on insulating negligence, certain evidentiary rulings of the trial court, and the award of prejudgment interest.

"A motion for JNOV is essentially a renewal of a motion for a directed verdict. The standard to be employed by a trial judge in determining whether to grant a judgment notwithstanding the verdict is the same standard employed in ruling on a motion for a directed verdict." *State Properties, LLC v. Ray*, 155 N.C. App. 65, 72, 574 S.E.2d 180, 185-86 (2002) (citations omitted).

In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant. The non-movant is given the benefit of every reasonable inference which may legitimately be drawn from the evidence, resolving contradictions, conflicts, and inconsistencies in the non-movant's favor. A motion for directed verdict should be denied if more than a scintilla of evidence supports each element of the non-moving party's claim.

Trantham v. Michael L. Martin, Inc., ___ N.C. App. ___, ___, 745 S.E.2d 327, 331 (2013) (quotations and citations omitted).

Negligence / Negligence Per Se

[1] Defendant argues that plaintiff failed to prove the elements of negligence and, thus, the trial court erred in denying defendant's motion for JNOV. Defendant contends plaintiff failed to establish that defendant owed Nathan Coppick a duty of care, and failed to put forth evidence that defendant installed the nozzle used by Nathan at the time of his death. We disagree.

In order to set out a *prima facie* claim of negligence against [the defendant], [the] plaintiff was required to present evidence tending to show that (1) [the defendant] owed a duty to [the] plaintiff; (2) [the defendant] breached that duty; (3) such breach constituted an actual and proximate cause of plaintiff's injury; and, (4) [the] plaintiff suffered damages in consequence of the breach.

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Cucina v. City of Jacksonville, 138 N.C. App. 99, 102, 530 S.E.2d 353, 355 (2000) (citation omitted). However, where there is a violation of a safety statute, the traditional role of the jury in determining whether plaintiff has set forth a prima facie case of negligence is superseded, and defendant-violator is considered to be negligent as a matter of law, or negligent *per se*.

The statute prescribes the standard, and the standard fixed by the statute is absolute. The common law rule of ordinary care does not apply – proof of the breach of the statute is proof of negligence. The violator is liable if injury or damage results, irrespective of how careful or prudent he has been in other respects.

Cowan v. Transfer Co. & Carr v. Transfer Co., 262 N.C. 550, 554, 138 S.E.2d 228, 231 (1964).

The general rule in North Carolina is that the violation of a public safety statute constitutes negligence *per se*. A public safety statute is one imposing upon the defendant a specific duty for the protection of others. Significantly, even when a defendant violates a public safety statute, the plaintiff is not entitled to damages unless the plaintiff belongs to the class of persons intended to be protected by the statute, and the statutory violation is a proximate cause of the plaintiff's injury.

Stein v. Asheville City Bd. Of Educ., 360 N.C. 321, 326, 626 S.E.2d 263, 266 (2006) (citations and quotations omitted).

Defendant's duty of care argument, which in effect challenges the duty imposed pursuant to the public safety statute in question—here, the N.C. Building Code—must fail. See *Stultz v. Thomas*, 182 N.C. 470, 473, 109 S.E. 361, 362 (1921) (holding that “[a] failure to discharge an affirmative duty imposed by law has been held by us, in a number of cases, to constitute an act of negligence *per se* In fact, a breach of a legal duty, or a duty imposed by law, comes within the very definition of negligence[.]” (citations omitted)).

Pursuant to General Statutes, section 143-138, “[t]he [Building] Code may regulate activities and conditions in buildings, structures, and premises that pose dangers of fire, explosion, or related hazards. Such fire prevention code provisions shall be considered the minimum standards necessary to preserve and protect public health and safety” N.C. Gen. Stat. § 143-138(b1) (2013). “The N.C. Building Code has the force

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of law[,] . . . and a violation thereof is negligence *per se*.” *Lindstrom v. Chesnutt*, 15 N.C. App. 15, 22, 189 S.E.2d 749, 754 (1972) (citations omitted). “[T]he Code imposes liability on any person who constructs, supervises construction, or designs a [structure] or alteration thereto, and violates the Code such that the violation proximately causes injury or damage.” *Olympic Products Co. v. Roof Sys., Inc.*, 88 N.C. App. 315, 329, 363 S.E.2d 367, 375 (1988) (citation omitted).

In the instant case, the specific activity subject to regulation by the Code was the use of certain nozzles containing a hold-open latch. “Dispensing of Class I, II or IIIA liquids into the fuel tanks of marine craft shall be by means of an approved-type hose equipped with a listed automatic-closing nozzle *without a latch-open device*.” N.C. Fire Prevention Code § 2209.3.3 (2002) (emphasis added). As a producer, installer and maintainer of fuel dispensing systems which are placed on premises that pose a danger of fire or explosion, defendant is subject to the duty imposed under the code.

Defendant argues that it could not be found liable based on negligence *per se* absent a showing of a violation of the code and a showing that defendant knew or should have known of the violation. Plaintiff, however, points to evidence in the record that defendant admitted to being a general contractor licensed by the State of North Carolina and, as such, is required to have knowledge of the North Carolina Building Code before obtaining a general contractor license. *See* N.C. Gen. Stat. § 87-10(b) (2013) (“Application for license [for General Contractors]” “(b) The Board shall conduct an examination . . . of all applicants for license to ascertain . . . (ii) the qualifications of the applicant in reading plans and specifications, knowledge of relevant matters contained in the North Carolina State Building Code . . . ; (iii) the knowledge of the applicant as to the responsibilities of a contractor to the public and of the requirements of the laws of the State of North Carolina relating to contractors [and] construction . . .”).

Despite defendant’s contention that the Code does not specify who is responsible for compliance with the section that regulates nozzles and hoses at marine fueling stations, plaintiff’s evidence showed that the responsibility for complying with the Code fell upon the marina owner and upon the person or entity who installed the nozzles. Plaintiff’s evidence, as presented by Chief Fire Code Consultant for the North Carolina Department of Insurance Office of State Fire Marshal Richard Strickland, showed that the Code placed on defendant a duty to provide to marinas the approved type of hose equipped with the proper nozzles, and that providing a prohibited nozzle constitutes negligence *per se*.

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- Q. So the law of our state, then, would require as of 2002 that you cannot place a nozzle on a fuel-dispensing system at a marina that contains a hold-open latch; is that correct?
- A. That is correct.
- Q. And to do so would be illegal in that it violates the North Carolina State Building Code, correct?
- A. Yes, it would be in violation of [the] North Carolina State Building Code.

In support of its argument that the trial court erred in denying defendant's motion for JNOV and, alternately, a new trial, defendant contends that plaintiff failed to establish defendant installed the gasoline nozzle Nathan used when re-fueling the charter boat, the Championship II. Plaintiff responds that the evidence presented at trial established defendant was the only company, contractor, or supplier to provide and maintain the fuel dispensing equipment. Evidence in the record supports plaintiff's response that defendant was the sole supplier and installer of fuel dispensing equipment to the marina, including the types of nozzles alleged to be in violation of the statute.

For example, Nick Harmon, who worked at the marina in the summer of 2005, 2006, and 2007 as assistant dock manager, then as dock manager, testified that nozzles containing hold-open latches¹ were used "very often" in fueling the boats. With six fueling points and multiple boats coming in, a person could start refueling one vessel, then move to a second boat and refuel it. Harmon testified that nozzles containing hold-open latches were used to refuel the Championship II, as well as other boats. Harmon recalled defendant installing and maintaining the nozzles containing hold-open latches: "I knew [defendant's] mechanics and techs very well" but knew of no other company that provided maintenance for the fuel dispensers.

Further, defendant made the following pertinent factual admissions which were allowed as evidence before the jury: that on 27 July 2006, defendant installed five new gasoline nozzles on the fuel dispensers at the marina; that the dispensers were "automatic-closing nozzles which contained hold-open latches"; that defendant's records showed that defendant had performed maintenance/service work on the fuel

1. Nozzles containing hold-open latches allow gasoline to flow continuously without the necessity of an attendant applying pressure to the nozzle.

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dispensing system at the marina every year since 1998; and, that the nozzle on the fuel dispenser involved in the 10 June 2008 fire and explosion on the Championship II would dispense 10 gallons of fuel per minute if set on full speed with the hold-open latch engaged.

This evidence, presented by plaintiff at trial, tended to show that defendant installed and maintained fuel delivery equipment, including gasoline nozzles that contained hold-open latches, which was in violation of the Fire Code referenced above. Such a violation, plaintiff contends, constitutes negligence *per se*.

Defendant, at trial and now on appeal, urges our review of contradictory testimony regarding the type of nozzle used by Nathan and the installation of the nozzle. However, for purposes of ruling on a motion for JNOV, the trial court must resolve all conflicts, contradictions, and inconsistencies in the light most favorable to the non-movant, here, plaintiff. *See Trantham*, ___ N.C. App. at ___, 745 S.E.2d at 331. Taken in the light most favorable to plaintiff and giving plaintiff the benefit of every reasonable inference, there was sufficient evidence presented to the jury for the jury to find that defendant installed and performed routine maintenance on the fuel dispensing system at Hobbs Westport Marina, including changing the fuel dispensing nozzles.

This evidence was sufficient to support the trial court's instruction on negligence *per se* which followed the pattern jury instructions and properly stated the law as to negligence and negligence *per se*. Therefore, this evidence was sufficient to prove that defendant was subject to the safety statute at issue in this litigation and that defendant's actions were in violation of the statute and, thus, sufficient to prove liability for negligence *per se*, provided there was proximate cause. *See Stein*, 360 N.C. at 326, 626 S.E.2d at 266 ("The general rule in North Carolina is that the violation of a public safety statute constitutes negligence *per se*. . . . [The plaintiff may recover if he] belongs to the class of persons intended to be protected by the statute, and the statutory violation is a proximate cause of the plaintiff's injury." (citations omitted)). Therefore, we review defendant's arguments regarding proximate cause.

Proximate Cause

[2] Defendant contends plaintiff failed to establish that any conduct of defendant proximately caused the explosion on 10 June 2008. We disagree.

"The test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the

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reasonable foresight of the defendant.” *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 431-32, 677 S.E.2d 485, 504 (2009) (citation omitted). “Actual causation may be proved by circumstantial evidence, and this principle is equally as true in fire cases as in any other tort liability case.” *Collins v. Caldwell Furniture Co.*, 16 N.C. App. 690, 694, 193 S.E.2d 284, 286 (1972) (citation omitted). “[W]hat is the proximate cause of an injury is ordinarily a question for the jury.” *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 235, 311 S.E.2d 559, 566 (1984) (citation and quotations omitted); *see also Jenkins v. Helgren*, 26 N.C. App. 653, 658, 217 S.E.2d 120, 123 (1975) (“Certainly it is both probable and foreseeable that fire will be the consequence of a serious fire hazard. Beyond question the fumes which defendants here allowed to accumulate constituted a serious fire hazard as a direct consequence of which the damaging fire occurred. One whose negligence creates the hazard of fire cannot escape responsibility merely because the source of the triggering spark may not be shown.” (citations omitted)).

Defendant states that no expert testified as to the cause or origin of the explosion, and that plaintiff relied entirely upon circumstantial evidence. However, expert testimony was not required to establish the cause or origin of the explosions. *See Associated Indus. Contr’rs, Inc. v. Fleming Eng’g, Inc.*, 162 N.C. App. 405, 411-12, 590 S.E.2d 866, 871 (2004) (“It is well settled that the standard of care must be determined by expert testimony unless the conduct involved is within the common knowledge of laypersons. Where, as in the instant case, the service rendered does not involve esoteric knowledge or uncertainty that calls for the professional’s judgment, it is not beyond the knowledge of the jury to determine the adequacy of the performance.” (citation omitted)).

Here, plaintiff put forth sufficient evidence, both direct and circumstantial, as to the cause or origin of the explosion. For example, the nozzle and hose used to refuel the Championship II just prior to the explosion was plaintiff’s Exhibit 38D. Exhibit 38D, along with the remaining nozzles taken from the marina, utilized a “hold-open latch.” When refueling a boat, marina dockhands could “engage the hold-open latch and then go about doing other business[,]” because the hold-open latch is supposed to disengage and stop the flow of fuel when the gasoline reaches the top of the tank being filled. However, one marina customer described an overflow of fuel from the gasoline tank on his boat as he refueled on 7 June 2008—three days before the explosion. “I looked over the side and gas was coming back out of the boat – or out of the spigot. So I jumped out of the boat, flipped the [dispenser] off, the gas, so it stopped.”

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Q. How much gas do you think roughly spilled out?

A. Well, I mean, I don't know. Usually I didn't fill up unless the tank was close to empty . . . , but I would say at least a couple gallons. Maybe not quite that much.

The nozzles used at the marina had three speeds; "the fastest was 10 gallons a minute, the middle one was about 5 gallons a minute, and the lowest one was 2 gallons a minute."

Q. . . . [F]rom the time that nozzle was put in and switched on until the explosion, how long [was that]?

A. It appeared to be about six minutes.

. . .

Q. So just using simple math, that would have meant that 60 gallons of gas was pumped during that time?

. . .

Q. . . . So if [the nozzle] worked, it might have shut off [when the tank was full], but if it didn't work, if it pumped that whole time, 6 times 10 is 60 gallons of gas would have been pumped into whatever tank that nozzle was in?

A. It could have.

At least one defense witness testified that the fuel nozzle used to refuel the Championship II had not "clicked off" prior to the explosion. Also, evidence at trial showed that the manufacture date on the nozzle, Exhibit 38D, matched the month defendant invoiced the marina for a standard nozzle, indicating that defendant sold the nozzle that was used by Nathan Coppick to refuel the Championship II on 10 June 2008.

In addition to the testimony and exhibits, the jury was able to view as substantive evidence the video recording of events leading up to the explosions, and to decide, along with other evidence, whether plaintiff had established proximate cause. This evidence, taken in the light most favorable to plaintiff, was sufficient to enable the jury to find that the gas dispenser nozzle used in refueling the Championship II failed to shut-off after the tank reached maximum capacity, causing excess gasoline to spill out into the surrounding water. Further, from this evidence the jury could find that a vapor cloud appeared shortly before the excess gasoline spilled into the water and then ignited, resulting in two explosions

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and a fire which engulfed the stern of the Championship II and killed Nathan Coppick. On this record there was sufficient evidence of negligence *per se*, including evidence of proximate cause, to survive a motion for JNOV and, alternatively, a new trial. *See Trantham*, ___ N.C. App. at ___, 745 S.E.2d at 331 (citations and quotations omitted). Defendant's arguments are overruled.

Jury Instructions

[3] Based on our preceding analysis, we overrule defendant's contentions that the trial court erred by instructing the jury on negligence and negligence *per se*. However, while we disagree with defendant, we nevertheless review defendant's argument that the trial court erred in denying its request for an instruction on insulating negligence.

On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Boykin v. Kim, 174 N.C. App. 278, 286, 620 S.E.2d 707, 713 (2005) (citations and quotations omitted).

An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote. It is immaterial how many new elements or forces have been introduced, if the original cause remains active, the liability for its result is not shifted.

Hairston, 310 N.C. at 236, 311 S.E.2d at 566-67 (citation omitted). "Insulating negligence means something more than a concurrent and contributing cause. It is not to be invoked as determinative merely upon proof of negligent conduct on the part of each of two persons, acting independently, whose acts unite to cause a single injury." *Id.* at 236, 311 S.E.2d at 566 (citations omitted).

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Defendant contends it presented sufficient evidence as to the negligence of others to support giving the instruction on insulating negligence. Defendant argues that its evidence showed, for example: that the owner/operator of the Championship II allowed the vessel to be refueled with the boat systems on; that the marina officers instructed marina employees to use the fuel dispensing nozzles containing hold-open latches; that the marina cashier failed to oversee the fuel dispensing process; and that the marina changed fuel dispensing nozzles and failed to test them.

While defendant points to conduct noted above which may have contributed to the cause of the 10 June 2008 explosion, defendant fails to direct our attention to conduct which reasonably may have been viewed as “a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question,” *id.* at 236, 311 S.E.2d at 566, that is, the explosion and fire that led to the death of Nathan Coppick. From our independent review of the record, we are unable to find any conduct that supersedes the original conduct of defendant where such conduct constituted a violation of a safety statute and which proximately caused the death of Nathan Coppick. *See id.* at 236, 311 S.E.2d at 566-67. Therefore, we hold that the trial court properly denied defendant’s request for an instruction on insulating negligence. Accordingly, defendant’s argument is overruled.

Evidentiary Rulings

[4] Defendant argues that the trial court erred in evidentiary rulings and other rulings, resulting in a manifest abuse of discretion. Defendant contends the trial court erred in allowing witnesses to testify to damages he or she sustained as a result of Nathan Coppick’s death, allowing two witnesses to “vouch for other testimony that [had] been given,” admitting a photograph of Nathan Coppick’s body where it was found after the explosion, and overruling defendant’s objection to plaintiff’s cross-examination of defendant’s president. While defendant acknowledges that, standing alone, the contested admissions would likely not amount to reversible error, defendant nevertheless contends that the cumulative effect of these rulings was prejudicial. Defendant further argues that the admission of the contested evidence resulted in confusion of the jury and prejudice to defendant requiring a new trial.

However, other than defendant’s assertions, we see no evidence in the record that the trial court’s rulings resulted in confusion of the jury and/or undue prejudice to defendant such that a new trial is required. Accordingly, we overrule this argument.

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Prejudgment Interest

[5] Defendant argues that the trial court erred in its award of pre-judgment interest based on the full amount of compensatory damages awarded, \$1,500,000.00. Defendant contends pre-judgment interest should be calculated based only on the portion of compensatory damages for which defendant is responsible. We disagree.

As defendant concedes, our Supreme Court previously addressed this issue in *Brown v. Flowe*, 349 N.C. 520, 507 S.E.2d 894 (1998). In *Brown*, the Court directly rejected the defendant's argument that a trial court should subtract the amount of settlements received from joint tortfeasors from the total compensatory award before calculating the pre-judgment interest. *Id.* at 526, 507 S.E.2d at 898. The Court reasoned that this proposed method was "prohibited by the plain language of N.C.G.S. § 24-5, which requires calculation of pre-judgment interest on the entire compensatory-damages verdict." *Id.*

To calculate pre-judgment interest when judgment is rendered against one, but not all, tortfeasors, our Supreme Court outlined the following process:

- (1) adding pre-judgment interest at the legal rate to the entire compensatory damages award as N.C.G.S. § 24-5(b) requires, (2) adding interest at the legal rate to the settlement sum from the date of settlement until the date of judgment, and (3) subtracting the second calculation from the first to determine the amount of compensatory damages [the] defendant owes to [the] plaintiff.

Id. at 527, 507 S.E.2d at 898; *see also Boykin*, 174 N.C. App. at 288, 620 S.E.2d at 714 (holding that pre-judgment interest is to be awarded before a set-off is given for the settlement amount).

Here, the trial court applied pre-judgment interest at a rate of eight percent (8%) per annum to the total \$1,500,000.00 compensatory award beginning 9 June 2010, the date the claim was filed, through 11 April 2013, the date of entry of judgment, less any credits to which defendant may be entitled by law. In a post-trial hearing, the trial court explained that to calculate the share of the total award due from each party, the trial court would follow the following formula: "[First,] [a]dding pre-judgment interest at the legal rate to the entire compensatory damages. . . . [Second], adding interest at the legal rate to the settlement sum from the date of settlement until the date of judgment and [third,] subtracting the second calculation from the first." *Id.* This is in accordance with

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the formula espoused by our Supreme Court in *Brown*. Accordingly, we overrule defendant's argument and find no error in the judgment and award of the trial court.

NO ERROR.

Chief Judge McGEE and Judge STROUD concur.

ANNETTE M. HAWKINS, AS ADMINISTRATRIX OF THE ESTATE OF
RICHARD V. HAWKINS, JR., DECEASED, PLAINTIFF

v.

EMERGENCY MEDICINE PHYSICIANS OF CRAVEN COUNTY, PLLC, GARY H. LAVINE, M.D., EAGLE HOSPITALIST CONNECTIONS, LLC, ANUBHI GOEL, M.D., CAROLINAEAST HEALTH SYSTEM, DOING BUSINESS AS CAROLINAEAST MEDICAL CENTER, ALSO DOING BUSINESS AS CRAVEN REGIONAL MEDICAL CENTER, CAROLINAEAST PHYSICIANS, WILLIAM H. BOBBITT, III, M.D., AND JOHN A. WILLIAMS, III, M.D., DEFENDANTS

No. COA14-877

Filed 7 April 2015

1. Appeal and Error—interlocutory orders and appeals—multiple defendants—overlapping facts

Plaintiff's appeal of the trial court's order granting summary judgment in favor of one defendant was interlocutory and therefore properly before the Court of Appeals. Because plaintiff's medical malpractice lawsuit against multiple defendants involved the same underlying facts, different proceedings could result in inconsistent verdicts.

2. Medical Malpractice—summary judgment—proximate causation

The trial court did not err by granting summary judgment in favor of defendant doctor in a medical malpractice lawsuit. The affidavits of expert witnesses submitted by plaintiff were insufficient to create a genuine issue of material fact regarding proximate causation because they conflicted with the experts' deposition testimony. As for plaintiff's other argument, the deposition testimony of the expert witnesses was insufficient to create a genuine issue of material fact because none of the experts testified that decedent would not or probably would not have died but for the actions of defendant.

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Appeal by plaintiff from order entered 2 April 2014 by Judge W. Allen Cobb, Jr. in Craven County Superior Court. Heard in the Court of Appeals 3 February 2015.

BUTLER DANIEL & ASSOCIATES, PLLC, by A. L. Butler Daniel and Erin K. Pleasant, for plaintiff.

CRANFILL SUMNER & HARTZOG, LLP, by Jaye E. Bingham-Hinch and Christopher M. Hinnant, for defendants.

ELMORE, Judge.

Annette M. Hawkins (“plaintiff”), executrix of the estate of Richard V. Hawkins, Jr., appeals the trial court’s order granting summary judgment in favor of Gary H. Lavine, M.D., and Emergency Medical Physicians of Craven County, PLLC (collectively “defendants”).

I. Background

The facts of this case are largely undisputed. In the early morning hours of 15 January 2011, Richard Hawkins (“Mr. Hawkins”) woke up to take a pill. However, upon swallowing it, he lost consciousness and fell to the floor, hitting his head on the way down. Mr. Hawkins’ wife called the Cove City Rescue Squad. The paramedics noticed a laceration on the back of Mr. Hawkins’ head that was one inch long and one-half an inch wide. Mr. Hawkins was transported by ambulance to the Emergency Department (“ED”) at CarolinaEast Medical Center at approximately 2:36 a.m.

Dr. Gary Lavine (“Dr. Lavine”) was the emergency physician on duty. Upon arrival, Dr. Lavine examined Mr. Hawkins. Mr. Hawkins stated that on a scale of one to ten, the pain in his head was a five, and he felt nauseated. Dr. Lavine ordered an echocardiogram (EKG), which revealed an improper heart rhythm known as atrial fibrillation, or atrial flutter. The danger from atrial fibrillation is a stroke. Dr. Lavine also ordered a CT scan of Mr. Hawkins’ brain, which was interpreted by the radiologist on duty as normal, showing no active intracranial bleed or acute abnormalities.

Dr. Lavine consulted with Dr. William H. Bobbitt, III, the hospitalist on call, and arrangements were made to admit Mr. Hawkins to the medical center for monitoring and treatment of his atrial fibrillation. Out of concern for Mr. Hawkins’ atrial fibrillation, Dr. Lavine ordered one dose of the anticoagulation medication Lovenox, which was administered to Mr. Hawkins in the ED at 6:21 a.m. on 15 January 2011. The purpose of

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Lovenox is to prevent the formation of blood clots. According to the testimony in this case, Lovenox is a fast-acting, but not long lasting, anticoagulation with a half-life of approximately four and a half hours. Therefore, the single dose ordered by Dr. Lavine normally would have lost its effectiveness by 6:30 p.m.—approximately twelve hours after it was administered.

Mr. Hawkins was admitted to the hospital at approximately 6:30 a.m. that same day. Because Dr. Lavine was employed by the hospital as an emergency physician only, he did not have privileges to practice inside the hospital. Therefore, Dr. Lavine was not responsible for Mr. Hawkins' medical care after Mr. Hawkins was admitted. Dr. Lavine's four-day shift ended on the morning of 15 January, and he did not return to the ED for another four days.

During Mr. Hawkins' stay in the medical center, subsequent treating physicians ordered additional doses of anticoagulation medications, including Coumadin and aspirin. In addition, Dr. Bobbit ordered a dose of Lovenox every twelve hours. In total, Mr. Hawkins received four doses of Lovenox while he was admitted, plus the one dose he received in the ED.

Mr. Hawkins was scheduled to be discharged from CarolinaEast on 17 January 2011, after undergoing a cardioversion procedure that was intended to treat his atrial fibrillation. However, after the procedure was performed on the morning of 17 January, physicians had difficulty waking Mr. Hawkins from the anesthesia. Doctors ordered an MRI of Mr. Hawkins' brain, which showed that Mr. Hawkins had suffered an intracranial brain hemorrhage. In an attempt to best treat this condition, Mr. Hawkins was transferred to the University of North Carolina hospital, where he died from complications due to the intracranial hemorrhage on 20 January 2011.

On 2 September 2011, plaintiff filed suit against CarolinaEast Health System, Emergency Medicine Physicians of Craven County, PLLC; Dr. Gary H. Lavine; Eagle Hospitalist Connections, LLC; Dr. William H. Bobbit, III; Dr. Anubhi Goel; The Heart Center of Eastern Carolina, PLLC; and Dr. John A. Williams, III. On or about 18 November 2013, Dr. Lavine and Emergency Medical Physicians of Craven County, PLLC (collectively "defendants") moved for summary judgment on grounds that plaintiff failed to forecast sufficient evidence on the issue of causation. On 2 April 2014, Judge W. Allen Cobb, Jr., entered an order granting defendants' motion for summary judgment. Plaintiff appeals the summary judgment order entered in defendants' favor.

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II. Interlocutory Order

[1] First, we must consider whether this appeal is properly before this Court. In the case *sub judice*, summary judgment was granted as to one but not all of the defendants and the trial court did not certify that there was “no just reason for delay” as required by N.C. Gen. Stat. § 1A–1, Rule 54(b) (2013). However, N.C. Gen. Stat. § 1–277 (2013) and N.C. Gen. Stat. § 7A–27(b)(3)(a) and (b) (2013) allow this Court to consider an interlocutory appeal where the grant of summary judgment affects a substantial right. *Id.*

Our Supreme Court has held that a grant of summary judgment as to fewer than all of the defendants affects a substantial right when there is the possibility of inconsistent verdicts, stating that it is ‘the plaintiff’s right to have one jury decide whether the conduct of one, some, all or none of the defendants caused his injuries. This Court has created a two-part test to show that a substantial right is affected, requiring a party to show “(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.

Camp v. Leonard, 133 N.C. App. 554, 557–58, 515 S.E.2d 909, 912 (1999) (citations and internal quotations omitted).

This case involves multiple defendants but the same factual issues. Therefore, “different proceedings may bring about inconsistent verdicts on those issues.” *Burgess v. Campbell*, 182 N.C. App. 480, 483, 642 S.E.2d 478, 481 (2007). Because plaintiff’s suit alleges several overlapping acts of medical malpractice resulting in harm, we hold that it is best that one jury hears the case. *Id.* As such, we conclude that the trial court’s grant of summary judgment affects a substantial right, and this Court will hear the merits of plaintiff’s appeal.

III. Standard of Review

Plaintiff appeals from the order granting summary judgment in favor of defendants.

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A–1, Rule 56(c) (2013). “On appeal, an order allowing summary

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judgment is reviewed *de novo*.” *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

Our Supreme Court has “emphasized that summary judgment is a drastic measure, and it should be used with caution. This is especially true in a negligence case[.]” *Williams v. Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979) (internal citation omitted). Upon a motion for summary judgment, “[t]he moving party carries the burden of establishing the lack of any triable issue . . . and may meet his or her burden by proving that an essential element of the opposing party’s claim is nonexistent[.]” *Lord v. Beerman*, 191 N.C. App. 290, 293, 664 S.E.2d 331, 334 (2008) (internal quotations and citations omitted). If met, the burden shifts to the nonmovant to produce a forecast of specific evidence of its ability to make a *prima facie* case, *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003), “which requires medical malpractice plaintiffs to prove, in part, that the treatment caused the injury. Not only must it meet our courts’ definition of proximate cause, but evidence connecting medical negligence to injury also must be probable, not merely a remote possibility.” *Cousart v. Charlotte-Mecklenburg Hosp. Auth.*, 209 N.C. App. 299, 302, 704 S.E.2d 540, 543 (2011) (quotation and citation omitted).

IV. Analysis

[2] Plaintiff contends that the trial court erred when it allowed defendants’ motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56. Specifically, plaintiff argues that a genuine issue of fact exists as to whether Dr. Lavine’s negligence was the proximate cause of Mr. Hawkins’ death. We disagree.

A plaintiff asserting medical negligence must offer evidence that establishes the following essential elements: “(1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff.” *Purvis v. Moses H. Cone Mem’l Hosp. Serv. Corp.*, 175 N.C. App. 474, 477, 624 S.E.2d 380, 383 (2006) (internal quotation marks and citation omitted). Proximate cause is defined as:

a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff’s injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such

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a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Williamson v. Liptzin, 141 N.C. App. 1, 10, 539 S.E.2d 313, 319 (2000) (quoting *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984)).

A medical negligence plaintiff must rely on expert opinion testimony to establish proximate causation of the injury in a medical malpractice action. *Cousart*, 209 N.C. App. at 303, 704 S.E.2d at 543; *see also Smithers v. Collins*, 52 N.C. App. 255, 260, 278 S.E.2d 286, 289 (1981) (noting that expert testimony is generally necessary “when the standard of care and proximate cause are matters involving highly specialized knowledge beyond the ken of laymen”). “[A]n expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility.” *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000).

Plaintiffs are required to make a *prima facie* case of medical negligence during a summary judgment hearing, “which includes articulating proximate cause with specific facts couched in terms of probabilities.” *Cousart*, 209 N.C. App. at 303-04, 704 S.E.2d at 543. Importantly, “a party opposing a motion for summary judgment cannot create a genuine issue of material fact by filing an affidavit contradicting his prior sworn testimony.” *Pinczkowski v. Norfolk S. Ry. Co.*, 153 N.C. App. 435, 440, 571 S.E.2d 4, 7 (2002); *see also Carter v. West Am. Ins. Co.*, 190 N.C. App. 532, 539, 661 S.E.2d 264, 270 (2008) (“[A] non-moving party cannot create an issue of fact to defeat summary judgment simply by filing an affidavit contradicting his prior sworn testimony.”).

A. Admissibility of Affidavits

Plaintiff contends that the affidavits of expert witnesses Dr. John Meredith, Dr. Harry Shaw Strothers, and Dr. Robert Stark were sufficient to survive summary judgment on the issue of proximate cause. Further, assuming *arguendo* that the affidavits were inadmissible, plaintiff argues that the collective deposition testimony of the expert witnesses was sufficient to establish that Dr. Lavine’s negligence was a proximate cause of Mr. Hawkins’ death.

To the contrary, defendants argue that the trial court erred in admitting the affidavits executed by Drs. Meredith, Stark, and Strothers because the experts’ prior deposition testimony contradicted the statements made in their affidavits. Further, without the admission of the

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affidavits, defendants argue that plaintiff failed to establish the proximate cause necessary to survive summary judgment.

After careful review, we agree with defendants in that the expert opinions offered by plaintiff regarding causation—set forth in three affidavits—cannot be relied upon to establish proximate cause. In addition, we hold that without these affidavits, plaintiff has failed to put forth the requisite evidence to survive summary judgment on the issue of causation.

The record indicates that between February and May 2013, discovery depositions were taken by defense counsel, and the following testimony was elicited:

Dr. Meredith:

Q. [W]ould you tell me how you believe Dr. Lavine breached the standard of care in his treatment of [Mr. Hawkins], please?

A. It's my professional opinion the standard of care was breached by Dr. Lavine when he provided anticoagulation to a patient—to this patient who had suffered a closed-head injury.

...

Q. Let me ask you this. Will you have any opinions on the issue of causation? Are you familiar with that term?

A. I am familiar with that term, and my response to that is no.

Dr. Strothers:

[Q. Was there a violation in the standard of care?]

A. [M]y understanding is that Dr. Bobbitt wrote the admission orders. So Dr. Lavine wouldn't have been responsible for the care afterwards, except that he placed him on the Lovenox. . . . I think since there had only been one dose of Lovenox, that [Mr. Hawkins'] odds would have improved, because he would have had what's thought to be a lesssant [sic] for anticoagulative dose of Lovenox. But I can't say what the change in those odds would have been.

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Dr. Stark:

Q. [I]f I understand what you're saying, is that your opinions will focus on how the care that was rendered by Dr. Williams caused or contributed to the death of [Mr. Hawkins]?

A. Yes.

However, approximately one week before the calendared summary judgment hearing, Dr. Meredith, Dr. Strothers, and Dr. Stark executed separate affidavits in which each independently provided:

[I]n my opinion, starting this patient (Mr. Hawkins) on a course of Lovenox by Dr. Lavine was unquestionably a direct cause of his ultimate demise.

During the depositions, these expert witnesses did not opine on the issue of causation. Specifically, none suggested that Dr. Lavine's conduct did cause or *probably* caused Mr. Hawkins' death. In fact, when asked if he had an opinion on causation, Dr. Meredith expressly responded "no," he did not have an opinion on the issue of causation. Despite this clear testimony, Dr. Meredith nevertheless testified in his affidavit that Dr. Lavine's conduct "was unquestionably a direct cause of [Mr. Hawkins] ultimate demise."

This statement plainly contradicted Dr. Meredith's deposition testimony. Dr. Strothers opined that Mr. Hawkins' odds would have "improved" had he only received one dose of Lovenox—a statement in stark contrast to his affidavit testimony. Dr. Stark would not opine on Dr. Lavine's conduct; he addressed only the alleged negligence of Dr. Williams in the deposition. Yet, in his affidavit, he too provided that Dr. Lavine's conduct "was unquestionably a direct cause of [Mr. Hawkins] ultimate demise."

The experts' affidavit testimony clearly contradicts the experts' deposition testimony. In *Rohrbough v. Wyeth Labs., Inc.*, 916 F.2d 970, 974 (4th Cir. 1990), a Fourth Circuit case cited by this Court in *Cousart*, an expert witness testified during a deposition concerning the possible ways by which the DTP vaccine might have caused neurological damage to the plaintiff, but the expert declined to state that the defendant's DTP vaccine actually caused the plaintiff's specific injuries. The Fourth Circuit noted that summary judgment would have been "unproblematic" if limited to the deposition testimony. *Id.* at 974. However, attached to the plaintiff's motion for summary judgment was an affidavit wherein the expert stated: "It is my opinion that [defendant's] DPT vaccine

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administered to [the plaintiff] . . . caused the neurological injuries from which she has suffered and continues to suffer.” *Id.* at 974-75. The Fourth Circuit recognized that “[t]his statement alone would appear to defeat defendant’s motion for summary judgment,” except that the expert’s affidavit was “in such conflict with his earlier deposition testimony that the affidavit should be disregarded as a sham issue of fact.” *Id.* at 975. The Fourth Circuit reasoned that “[a] genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the [expert’s] testimony is correct.” *Id.* (citation and quotation omitted). Therefore the expert’s affidavit testimony was excluded from the summary judgment evidence given that the expert avoided making a statement during the deposition that defendant’s vaccine caused the injury.

Similarly, in *Cousart*, expert witness Dr. Allen did not opine during his deposition testimony that a causal link existed between the defendants’ particular act or omission and the plaintiff’s injuries. *Cousart*, 209 N.C. App. at 308, 704 S.E. 2d at 546. However, when faced with the defendants’ motion for summary judgment, Dr. Allen stated by way of affidavit that “it was and always has been my opinion that the inappropriate prenatal care and management of labor and delivery by the Defendants more likely than not caused or contributed to the permanent brachial plexus injury[.]” *Id.* This Court opined that the “conflicts between Dr. Allen’s deposition and affidavits . . . leave the trial court with only a credibility issue, not a genuine issue of material fact.” *Id.* at 309, 704 S.E.2d at 547. As such, this Court held that it would be “improper” to consider the affidavit testimony given the contrary nature of the deposition testimony and the affidavit testimony. *Id.*

Here, it appears that in an effort to survive summary judgment, plaintiff filed the experts’ affidavits shortly before the summary judgment hearing in an attempt to create a genuine issue of material fact. However, the conflict between the experts’ deposition testimony and their affidavits has created a credibility issue, not a genuine issue of material fact. *See id.* As such, it is improper for this Court to consider the affidavit testimony of the expert witnesses in determining whether plaintiff raised a genuine issue of material fact on the issue of proximate cause. We must now discern whether plaintiff submitted other proximate cause evidence to create a genuine issue of material fact.

B. Proximate Causation

Plaintiff argues that she presented sufficient evidence to raise a genuine issue of material fact on causation even without the experts’ affidavit testimony. We disagree.

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Proximate causation is a cause “which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all of the facts then existing.” *Kanoy v. Hinshaw*, 273 N.C. 418, 426, 160 S.E.2d 296, 302 (1968). There is a two-pronged formula for proximate cause, which consists of a cause-in-fact and reasonable foreseeability. If a plaintiff is unable to show a cause-in-fact nexus between the defendant’s conduct and any harm, our courts need not consider the separate proximate cause issue of foreseeability.

In arguing that she presented sufficient evidence of direct causation to raise a genuine issue of material fact concerning proximate cause, plaintiff directs this Court’s attention to the deposition testimony of Dr. Meredith, Dr. Kenneth Fischer, and Dr. Strothers. Specifically, plaintiff argues that these experts “testified in their discovery depositions that the Lovenox ordered by Dr. Lavine was a cause of Mr. Hawkins’ death.”

In his deposition, Dr. Meredith testified that “the starting of the anticoagulation is inappropriate in an elderly patient who has sustained a closed-head injury or a traumatic brain injury. . . . The risks greatly outweighed the benefit of starting anticoagulation.” When asked if the Lovenox ordered by Dr. Lavine and administered to Mr. Hawkins actually caused Mr. Hawkin’s death, Dr. Meredith responded, “Lovenox contributed significantly.” However, when asked, “[w]ill you have any opinions on the issue of causation? Are you familiar with that term?” Dr. Meredith answered, “I am familiar with that term, and my response to that is no.” In addition, when asked whether the dose of Lovenox ordered by Dr. Lavine in the ED caused Mr. Hawkins’ bleed which led to his death, Dr. Meredith stated, “I can’t answer that.”

Dr. Fischer testified that “certainly most importantly the four doses of Lovenox would have had a substantial effect on [Mr. Hawkins’] bleeding times and the progression of the bleeding in the interval.” Dr. Fischer also opined that “the Lovenox was the principal causative agent for the bleeding.”

When asked whether Dr. Lavine violated the standard of care, Dr. Strothers testified that “my understanding is that Dr. Bobbitt wrote the admission orders. So Dr. Lavine wouldn’t have been responsible for the care afterwards, except that he placed him on the Lovenox. . . . I think since there had only been one dose of Lovenox, that [Mr. Hawkins’] odds would have improved, because he would have had what’s thought to be a lessant [sic] for anticoagulative dose of Lovenox. But I can’t say what the change in those odds would have been.”

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Again, a medical negligence plaintiff must rely on expert opinion testimony to establish proximate causation of the injury in a medical malpractice action. *Cousart, supra*. Although plaintiff argues that this testimony was sufficient to survive summary judgment on the issue of proximate cause, we disagree. None of the experts opined that the dose of Lovenox ordered by Dr. Lavine in the ED was a reasonably probable cause of Mr. Hawkins' death. Dr. Meredith specifically testified that he had no opinion on the issue of causation. In reviewing Dr. Fischer's testimony within the context of the deposition, Dr. Fischer's mention of the "four doses" of Lovenox appears to be in reference to the four doses administered to Mr. Hawkins once he was admitted, which is not inclusive of the dose Dr. Lavine ordered. Dr. Fischer never specified that Dr. Lavine probably caused Mr. Hawkins' death because he was responsible for starting him on Lovenox. Dr. Strothers' testimony suggested that Dr. Lavine did not cause Mr. Hawkins's death because, had Mr. Hawkins only received one dose of the drug, Mr. Hawkins' chances of survival would have "improved." Thus, none of the experts testified that Mr. Hawkins would not have or *probably* would not have died had Dr. Lavine not administered the dose of Lovenox to Mr. Hawkins in the ED. *Cf. Lord*, 191 N.C. App. at 300, 664 S.E.2d at 338 (finding insufficient evidence of proximate cause where neither of the plaintiff's expert witnesses were able to testify that the plaintiff's vision would *probably* be better today had the defendants initiated steroid treatment sooner).

In addition, and contrary to plaintiff's argument, plaintiff failed to show that Dr. Lavine's single order of Lovenox caused Mr. Hawkins' death because it induced the subsequent treating physicians to continue prescribing the drug. Unlike the plaintiff in *Burgess v. Campbell*, 182 N.C. App. 480, 642 S.E.2d 478 (2007), a case on which plaintiff relies, plaintiff in this case is unable to direct this Court to any testimony to show that Dr. Lavine's diagnosis misled the subsequent treating physicians or caused them to engage in a plan of treatment that caused Mr. Hawkins' death. In *Burgess*, Dr. Rosen, the physician who initially diagnosed the patient, misread the ultrasound films and failed to detect an intrauterine pregnancy. *Id.* at 484, 642 S.E.2d at 481. As such, there was a genuine issue of material fact as to whether the subsequent treating physicians may have relied in part on Dr. Rosen's misdiagnosis in proceeding with the patient's treatment. In the instant case, there is no evidence that Dr. Lavine misdiagnosed the patient or misread the MRI. The radiologist clearly interpreted Mr. Hawkins' MRI as showing no intracranial bleed, and Dr. Lavine likely relied on the radiologist's correct read of the MRI when ordering a single dose of Lovenox.

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Moreover, the record evidence suggests that the subsequent treating physicians were at liberty to continue or cancel Dr. Lavine's order of Lovenox after completing an independent evaluation of Mr. Hawkins. When asked, "[a]re you telling me that Dr. Lavine only intended this patient to have one dose?", Dr. Stephen Colucciello responded, "[w]ell, that's all he had control over. In the ED you give the dose and then additional anticoagulation is given by the admitting team." Dr. Colucciello further explained that the subsequent physicians may have taken into account the fact that Dr. Lavine ordered Lovenox; however, he noted that physicians "usually make their own determination for in-hospital treatment."

Plaintiff is unable to direct this court to any testimony that suggests Dr. Lavine implemented a plan of care that he believed the subsequent treating physicians were likely to follow after Mr. Hawkins was admitted to the hospital. After careful review of the record, we conclude that plaintiff failed to establish the first prong of the proximate cause analysis—that Dr. Lavine's conduct directly caused Mr. Hawkins' death. As such, we need not address plaintiff's arguments regarding foreseeability. Plaintiff has failed to show that she presented a genuine issue of material fact on the issue of causation against Dr. Lavine such that it was inappropriate for the trial court to grant summary judgment in favor of these defendants.

V. Conclusion

In sum, we conclude that plaintiff's evidence was insufficient to establish the requisite causal connection between Dr. Lavine's alleged negligence and Mr. Hawkins' death. The trial court did not err in granting summary judgment in favor of these defendants. Accordingly, we affirm the trial court's entry of summary judgment.

Affirmed.

Judges DAVIS and TYSON concur.

HIGH POINT BANK & TR. CO. v. FOWLER

[240 N.C. App. 349 (2015)]

HIGH POINT BANK AND TRUST COMPANY, PLAINTIFF

v.

ROBERT L. FOWLER, DELORES J. FOWLER, THOMAS P. BAKER,
AND PAMELA P. BAKER, DEFENDANTS

No. COA14-787

Filed 7 April 2015

**Appeal and Error—appealability—appellate rules—failure to
timely comply—dismissal of appeal**

Defendant's appeal from a trial court order dismissing their appeal was dismissed. Defendants failed to timely comply with the provisions of N.C. R. App. P. Rule 3 and plaintiff had taken no action that would constitute a waiver of any of the requirements of the North Carolina Rules of Appellate Procedure, including, without limitation, any action that could be construed as a waiver of the requirement of timely service of the notice of appeal.

Appeal by defendants from order entered 4 February 2014 by Judge Edgar B. Gregory in Guilford County Superior Court. Heard in the Court of Appeals 3 December 2014.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell, Christopher C. Finan, and Matthew A.L. Anderson, for plaintiff-appellee.

Katherine Freeman, PLLC, by Katherine Freeman, for defendant-appellants Robert P. Fowler and Delores J. Fowler.

BRYANT, Judge.

Because defendants' appeal from a trial court order dismissing their appeal is improper, we dismiss this appeal.

On 17 April 2013, in Guilford County Superior Court, plaintiff High Point Bank and Trust Company filed suit against defendants Armadillo Holdings, LLC; Robert L. Fowler; Delores J. Fowler; Thomas P. Baker; and Pamela P. Baker. Plaintiff alleged that Armadillo Holdings, LLC, executed a promissory note for the principal amount of \$1,080,000.00 on 31 January 2006. Also on 31 January 2006, defendants Robert L. Fowler, Delores J. Fowler, Thomas P. Baker, and Pamela P. Baker individually executed a Commercial Guaranty for the debt. At the time of the complaint, under the terms and conditions of the promissory note, Armadillo Holdings, LLC, was in default, and was indebted to plaintiff for the sum

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of \$651,251.00 plus interest. Plaintiff sought recovery against defendants jointly and severally.

On 27 June 2013, Robert Fowler and Delores Fowler filed an answer to the complaint. Armadillo Holdings, LLC, filed an answer to the complaint. Thomas P. Baker filed an answer to the complaint. The record does not reflect that Pamela Baker filed an answer to the complaint. On 10 July 2013, default was entered as to defendant Pamela Baker. Also, on 10 July 2013, plaintiff filed a notice of voluntary dismissal as to defendant Armadillo Holdings, LLC.

On 16 September 2013, plaintiff moved for summary judgment. On 27 September, Robert Fowler and Delores Fowler moved to amend their answer to the complaint. They sought to amend their answer to assert the defense that the commercial guaranties were void due to illegality: specifically, that plaintiff's pre-condition of a commercial guarantee prior to making a loan was an act of discrimination in violation of 15 U.S.C. 1691 *et seq.* and 12 C.F.R. 202.7(d).

On 22 October 2013, following a 7 October hearing before the Honorable Susan E. Bray, Judge presiding, the trial court entered an Order and Judgment granting plaintiff's motion for summary judgment and denying the Fowlers' motion to amend their answer. In its order, the court noted that a petition for relief had been filed on behalf of defendant Thomas Baker in the Middle District of North Carolina pursuant to Chapter 7 of the United States Bankruptcy Code. Accordingly, pursuant to the stay provisions of 11 U.S.C. 362, the civil action against defendant Thomas Baker was stayed. Default, pursuant to Rule 55 of the Rules of Civil Procedure, had already been entered against defendant Pamela Baker. The court also noted that having considered the Fowlers' motion to amend and plaintiff's materials in opposition, the court in its discretion would deny the motion. The court stated that "the allowance of an amendment to the pleadings would cause undue prejudice to [] Plaintiff, undue delay in the prosecution of this action and, even if allowed, the additional matters raised in the proposed amendment are futile[.]" The trial court went on to determine that there were no genuine issues of material fact and plaintiff was entitled to judgment as a matter of law.

On 20 November 2013, Robert Fowler and Delores Fowler (hereinafter defendants) filed notice of appeal from the 22 October 2013 judgment entered by Judge Bray.

On 5 December 2013, plaintiff filed a motion to dismiss defendants' appeal. In support of its motion, plaintiff contended that defendants

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failed to file and serve their notice of appeal within 30 days after the entry of the judgment pursuant to Rule 3 of the Rules of Appellate Procedure. According to plaintiff, defendants were required to file and serve their notice of appeal no later than 21 November 2013; however, even though the certificate of service attached to the notice of appeal was dated 20 November 2013, the envelope contained a postmark of 22 November 2013. Therefore, plaintiff asserted, defendants' appeal should be dismissed because "[t]he clear failure of the Defendants in this cause to timely act in accordance with the North Carolina Rules of Appellate Procedure constitutes a jurisdictional failure."

A hearing on plaintiff's motion to dismiss defendants' appeal was held on 6 January 2014 before the Honorable Edgar B. Gregory, Judge presiding, in Guilford County Superior Court. Plaintiff's motion to dismiss was granted. In its order of 4 February 2014, the trial court found that defendants failed to timely comply with the provisions of Rule 3 of the North Carolina Rules of Appellate Procedure and plaintiff "ha[d] taken no action that would constitute a waiver of any of the requirements of North Carolina Rules of Appellate Procedure, including, without limitation, any action that could be construed as a waiver of the requirement of timely service of the Notice of Appeal." The court concluded that "[t]he failure to give timely notice of appeal in compliance with Rule 3 of the North Carolina Rules of Appellate Procedure is jurisdictional and an untimely attempt to appeal mandates dismissal." Defendants appeal Judge Gregory's 4 February 2014 order granting plaintiff's motion to dismiss defendants' appeal.

On appeal, defendants argue that the trial court erred in determining that defendants' late service of a timely filed notice of appeal, without more, amounts to a jurisdictional default mandating dismissal of the appeal. However, as we note herein, defendants' appeal is not properly before this Court and, therefore, subject to dismissal.

Defendants cite *Hale v. Afro-American Arts Int'l*, 335 N.C. 231, 436 S.E.2d 588, *rev'g* 110 N.C. App. 621, 430 S.E.2d 457 (1993), where our Supreme Court reversed the disposition of the Court of Appeals for the reasons stated in the dissenting opinion. "[W]hile the timely filing of the Notice is necessary to grant this Court subject matter jurisdiction over the appeal, the service of the Notice may be waived by the appellee without depriving this Court of subject matter jurisdiction." *Hale*, 110 N.C. App. at 625, 430 S.E.2d at 460 (Wynn, J., dissenting).

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While we acknowledge this precedent established by our Supreme Court, we must also note that “[n]o appeal lies from an order of the trial court dismissing an appeal for failure to perfect it within apt time, the proper remedy to obtain review in such case being by petition for writ of certiorari.” *State v. Evans*, 46 N.C. App. 327, 327, 264 S.E.2d 766, 767 (1980) (citations omitted), quoted in *Mullis v. Se. Renal Assocs.*, No. COA10-763, 2011 N.C. App. LEXIS 609, at *1 (N.C. App. April 5, 2011), and *Carolina Tailors, Inc. v. Wagner*, No. COA07-776, 2008 N.C. App. LEXIS 361, at *2 (N.C. App. March 4, 2008). Therefore, as the trial court dismissed defendants’ appeal for failure to comply with the Rules of Appellate Procedure resulting in a failure to properly perfect the appeal, no appeal can lie to this Court, and defendants’ appeal is dismissed.

Even if we were to consider defendants’ brief as a petition for a writ of certiorari to reach the merits of defendants’ argument that the trial court erred in dismissing their appeal, *see* N.C. R. App. P. 21(a) (2014) (“[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . .”), it is unlikely we would rule in defendants’ favor.

Despite the language in the trial court’s order that dismissal of defendants’ appeal was mandated by the failure to timely serve plaintiff, the court also cited *Hale*, 335 N.C. 231, 436 S.E.2d 588. In its findings of fact, the trial court stated that plaintiff “ha[d] taken no action that would constitute a waiver of any of the requirements of the North Carolina Rules of Appellate Procedure, including, without limitation any action that could be construed as a waiver of the requirement of timely service of the Notice of Appeal.” Therefore, it would appear the trial court had sufficient basis to grant plaintiff’s motion to dismiss defendants’ appeal.

For the foregoing reasons, we dismiss defendants’ appeal.

DISMISSED.

Judges DILLON and DIETZ concur.

IN RE N.B.

[240 N.C. App. 353 (2015)]

IN THE MATTER OF N.B. & L.B.

No. COA14-1254

Filed 7 April 2015

1. Jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—facially valid order from another state

The trial court had jurisdiction to adjudicate the children neglected and dependent even though they were the subject of a prior custody order in New York. Nothing in the Uniform Child Custody Jurisdiction and Enforcement Act required North Carolina's district courts to undertake collateral review of a facially valid order from a sister state before exercising jurisdiction pursuant to N.C.G.S. § 50A-203(1). The New York Court's order was sufficient.

2. Child Abuse, Dependency, and Neglect—findings of fact—sufficiency of evidence

Although respondent mother challenged several of the district court's findings of fact as unsupported by the evidence in a child abuse, dependency, and neglect case regarding the mother's substance abuse problem; the paternal grandparents' ability to provide care; and the Mecklenburg County Department of Social Services, Youth and Family Services' reasonable efforts; there was competent evidence to support the pertinent findings.

3. Child Abuse, Dependency, and Neglect—guardianship awarded to paternal grandparents—verification of adequate resources—cessation of reunification efforts—findings of fact

The trial court did not err in a child abuse, dependency, and neglect case by awarding guardianship to the paternal grandparents allegedly without properly verifying that they would have adequate resources to care appropriately for the juveniles as required by N.C.G.S. § 7B-906.1(j). The findings exhibited that the trial court considered this factor. Further, the trial court ceased reunification efforts after making the necessary findings under N.C.G.S. § 7B-906.1(d)(3).

4. Child Visitation—minimum requirements—frequency—length of time—supervision

The trial court's visitation order met the minimum requirements for visitation. The trial court accounted for the minimum frequency

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[240 N.C. App. 353 (2015)]

and length of the visitation (one hour, once per month) and provided for the visitations to be supervised by the family therapist. The trial court left it to respondent mother to coordinate with the family therapist regarding these visits.

Appeal by respondent-mother (“Mother”) from order entered 11 August 2014 by Judge Louis A. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 16 March 2015.

Kathleen M. Arundell for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

Poyner Spruill LLP, by Caroline P. Mackie, for guardian ad litem.

Appellate Defender Staples Hughes, by Assistant Appellate Defender J. Lee Gilliam for respondent-appellant mother.

DILLON, Judge.

Mother appeals from the district court’s “Permanency Planning Review and Guardianship Order” which (1) changed the permanent plan for her children N.B. (“Noah”) and L.B. (“Lindsay”)¹ from “guardianship, with a concurrent goal of reunification with a parent” to one of guardianship; (2) awarded guardianship of the children to their paternal grandparents (“Mr. and Ms. Smith”); and (3) granted Mother one hour per month of supervised visitation. For the following reasons, we affirm the trial court’s order.

I. Background

In March 2006, the Jefferson County, New York, Department of Social Services filed a petition alleging that Mother had neglected Noah and Lindsay. The Jefferson County Family Court (the “New York Court”) subsequently entered an order concluding that Mother had neglected the children by her misuse of drugs while caring for the children and by her failure to address her long history of alcohol and substance abuse. The New York Court placed the children in the custody of respondent-father (“Father”) and ordered Mother to, *inter alia*, get treatment.

In March 2010, Father moved with the children to North Carolina. In October 2010, the New York Court entered an order “relinquishing jurisdiction to the State of North Carolina.”

1. We use pseudonyms throughout this opinion to protect the juveniles’ privacy.

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In February 2013, the Mecklenburg County Department of Social Services, Youth and Family Services (“YFS”) obtained non-secure custody of the children and filed a juvenile petition alleging that they were abused, neglected, and dependent, based in part on Mother’s abuse of alcohol and “reports of domestic violence between the mother and men that visit the home, in the presence of the children.”

In June 2013, the children were diagnosed with posttraumatic stress disorder (“PTSD”) from witnessing incidents of domestic violence involving their Mother.

In July 2013, the Mecklenburg County District Court adjudicated Noah and Lindsay neglected and dependent and ordered them to “remain in YFS custody with placement with [the paternal grandparents, Mr. and Ms. Smith].” The court found that Mother was drinking “excessively” and abusing drugs in front of her children and was involved in “frequent arguments” and “physical altercations” with her live-in boyfriend. The district court ordered Mother to have a psychological evaluation that included a substance abuse assessment as well as a domestic violence assessment.

In August 2013, the parents’ visitation was involuntarily suspended.

In September 2013, the district court entered a review order establishing a permanent plan of reunification “with a concurrent goal of guardianship.” It noted that Mother had yet to obtain her court-ordered evaluation and assessments. The court also found that Mother had not grasped the seriousness of her issues but had “minimized her substance abuse issues and her domestic violence issues with [her boyfriend.]”

In January 2014, the district court entered another review order, finding that neither parent had made progress toward reunification. The court found that although both children continued to exhibit PTSD symptoms, their symptoms had diminished since their parents’ visitation was suspended. The court ordered Mother to obtain a psychological evaluation and substance abuse and domestic violence assessments.

In February 2014, the district court changed Noah and Lindsay’s permanent plan to “guardianship; with a concurrent goal of reunification.” The court again noted the parents’ failure to obtain their court-ordered evaluations and described Father as having “all but ‘checked out.’” While “commend[ing] [M]other for the work she is doing[,]” the court identified the following issues as barriers to reunification: “domestic violence, substance abuse and mental health needs[,] the children’s mental health needs[, and] understanding the impact of the past on the children.”

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Subsequently, Mother obtained a psychological evaluation and substance abuse assessment from Nicole L. Cantley, Ph.D., resulting in Axis I diagnoses of attention deficit hyperactivity disorder; adjustment disorder with mixed anxiety and depressed mood; alcohol abuse, early full remission; and opioid dependence, sustained partial remission. Dr. Cantley reported that Mother “admits to a history of prescription drug addiction (i.e. barbiturates, benzodiazepines, opiates)[,]” but that Mother “still denies that such use caused problems[,]” and that despite a history of child neglect resulting from her abuse of drugs and alcohol, Mother “continues to externalize blame” and to display a “lack of insight that [treatment] is even medically necessary[.]” Dr. Cantley stated that Mother’s “willingness or ability to apply what she is learning may be short-lived outside the treatment program” unless Mother acknowledged a problem and accepted responsibility for her actions and specifically cautioned against Mother’s continued use of the prescription narcotic tramadol, which was “ill-advised” given her “history of narcotic and opiate addiction[.]”

In April 2014, a YFS social worker submitted a report informing the district court that she had discussed Dr. Cantley’s evaluation with Mother, and that Mother understood “that she was not to take [t]ramadol any longer as this was a controlled and addictive substance.”

In June 2014, the court entered an order, finding that Mother was “making progress” but ordered her to comply with her case plan and with Dr. Cantley’s recommendations.

In July 2014, the district court held a review hearing, speaking with Noah and Lindsay in chambers and hearing testimony from the social worker, Mr. and Ms. Smith, and Mother, and receiving into evidence a “Court Summary” and “Reasonable Efforts Report” prepared by YFS. The court also received a urinalysis showing Mother’s positive test for tramadol on 23 April 2014.

In August 2014, the court entered an order changing Noah and Lindsay’s permanent plan to guardianship and appointed Mr. and Ms. Smith as their guardians, based on the evidence and the recommendations of YFS and the guardian *ad litem*. Mother gave timely notice of appeal from this order.

II. Subject Matter Jurisdiction

[1] Mother first challenges the district court’s subject matter jurisdiction, claiming that the children were under the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”), and that North Carolina

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courts lacked “jurisdiction to adjudicate the children neglected and dependent when they were the subject of a custody order in New York.”

“The issue of subject matter jurisdiction may be considered by the court at any time, and may be raised for the first time on appeal[.]” *In re T.B.*, 177 N.C. App. 790, 791, 629 S.E.2d 895, 896-97 (2006), and is a question of law subject to *de novo* review. *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010).

The parties agree that the New York Court entered the “initial child-custody determination” for purposes of the UCCJEA. N.C. Gen. Stat. § 50A-201(a) (2013); *see also* N.C. Gen. Stat. § 50A-102(8) (2013) (“‘Initial determination’ means the first child-custody determination concerning a particular child.”). “Accordingly, any change to that [New York] order qualifies as a modification under the UCCJEA.” *In re N.R.M.*, 165 N.C. App. 294, 299, 598 S.E.2d 147, 150 (2004); *see also* N.C. Gen. Stat. § 50A-102(11) (2013).

The jurisdictional requirements for a modification under the UCCJEA are as follows:

[A] court of this State may not modify a child-custody determination made by a court of another state unless *a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) and:*

- (1) *The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or*
- (2) *A court of this State or a court of the other state determines that the child, the child’s parents, and any person acting as a parent do not presently reside in the other state.*

N.C. Gen. Stat. § 50A-203 (2013) (emphasis added). Under the UCCJEA, North Carolina courts have jurisdiction to make an initial determination under the UCCJEA if North Carolina is the “home state of the child on the date of the commencement of the proceeding[.]” N.C. Gen. Stat. § 50A-201(a)(1). A child’s “home state” is “the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding.” N.C. Gen. Stat. § 50A-102(7) (2013).

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In this case, the record shows that North Carolina has been the children's home state since March 2010, when they moved here with Father, as reflected in various court filings. Therefore, the first jurisdictional requirement for a modification under the UCCJEA is satisfied. *In re J.C.*, ___ N.C. App. ___, ___, 760 S.E.2d 778, 780 (2014).

The remaining jurisdictional requirement for a modification under the UCCJEA is satisfied by the New York Court's order "relinquishing jurisdiction to the State of North Carolina." See N.C. Gen. Stat. 50A-203(1). Indeed, the "Initial (7-Day) Order" entered in March 2013 by the district court in Mecklenburg County contains a finding that the New York Court "exercised jurisdiction during a custody hearing in August 2010; the NY court found no one resided in NY and relinquished jurisdiction to NC[.]"

We are unpersuaded by Mother's suggestion that the New York Court's order is insufficient to relinquish jurisdiction because that court's order lacks findings of fact to indicate the specific statutory basis under New York law for relinquishment. See N.Y. Dom. Rel. Law §§ 76-a, 76-f (2014). However, under the UCCJEA, "the original decree State is the sole determinant of whether jurisdiction continues." *In re N.R.M.*, 165 N.C. App. at 300, 598 S.E.2d at 151 (quoting N.C. Gen. Stat. § 50A-202 official cmt.). Nothing in the UCCJEA requires North Carolina's district courts to undertake collateral review of a facially valid order from a sister state before exercising jurisdiction pursuant to N.C. Gen. Stat. § 50A-203(1). The New York Court's order is sufficient. See *Williams v. Walker*, 185 N.C. App. 393, 403, 648 S.E.2d 536, 543 (2007). Accordingly, this argument is overruled.

III. Evidentiary Support for Findings

[2] Mother challenges several of the district court's findings of fact as unsupported by the evidence.

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law. If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004).

As in all dispositional proceedings, "[t]he court may consider any evidence, including hearsay evidence . . . or evidence from any person that is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate

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disposition.” N.C. Gen. Stat. § 7B-906.1(c) (2013). It is the province of the fact-finder to “weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom.” *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (citation omitted).

A. Mother’s Drug Abuse

Mother first objects to any suggestion in findings 11, 12, 13 and 28 that it was probable or likely that she would again abuse prescription pain medications. However, in her report, which the court incorporated by reference into its order, Dr. Cantley opined that “[a]lthough *relapse is common and symptomatic of drug and alcohol dependency, she is at greater risk* given that she quit for secondary gains (to comply with [YFS] recommendations and for reunification.” (Emphasis added.) Further she opined that there were “barriers to [Mother’s] progress in drug and alcohol treatment” which included “[Mother’s] lack of insight that it is even medically necessary, and her admittance that she is simply following the orders of YFS” and that “[Mother’s] willingness or ability to apply what she is learning may be short-lived outside of the treatment program.” Dr. Cantley’s report pointed to Mother’s proclivity “to externalize blame” as a barrier to progress.

Mother continued to exhibit these traits at the July 2014 review hearing. She testified that Noah and Lindsay “didn’t come into [YFS] custody because of something I did[,]” faulted YFS and the social worker for refusing to work with her, and accused Ms. Smith of “trying to sabotage” her relationship with the children. Mother claimed she had successfully completed substance abuse treatment and had done “[e]verything that [she] could do” to satisfy YFS. Disputing the YFS social worker’s testimony, Mother insisted she had “passed every drug screen.” As previously noted, however, a urinalysis confirmed Mother’s continued use of tramadol, contrary to Dr. Cantley’s recommendation and her own representations to YFS. We must conclude that there was competent evidence to support the trial court’s finding of a likelihood of future substance abuse by Mother.

Mother next takes issue with the reference in the order to her “admitted failure to[]reveal her addiction history to the prescribing doctors/professionals” in finding 12. However, her own testimony supports this finding. Specifically, she acknowledged taking hydrocodone for “more than a year” during these proceedings by obtaining prescriptions from her “family doctor” and then “a different doctor.” When asked whether she had made these prescribing doctors “aware of [her] substance

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abuse history[.]” Mother testified, “No. I didn’t abuse my medication.” Dr. Cantley reported that Mother was prescribed both hydrocodone and tramadol for pain, raising the possibility of another prescribing physician. This argument is overruled.

B. Grandparents’ Ability To Provide Care

Mother challenges the trial court’s finding that Noah and Lindsay “have blossomed under [Mr. and Ms. Smith’s] care.” However, there is competent evidence to support this finding. Specifically, Ms. Smith testified that the children were “doing pretty good” and are “progressing well under the circumstances.” She described Lindsay as “a normal teenager who seems happy and well adjusted” and who is “utilizing her skills for stress management” learned in therapy. She testified that Noah “is playing in a basketball league” and also “opening up to his therapist.” Ms. Smith informed the court that she and her husband had obtained “two lottery positions in a charter school” for the children. This exception is overruled.

Mother further objects to the finding that the Noah and Lindsay “feel safe and comfortable in the grandparents’ home.” She hinges this claim on the fact that the YFS court summary describes Noah as saying he felt “safe and comfortable” in his grandparents’ home but describes Lindsay as merely saying “that she felt ‘fine’ and ‘safe[.]’” We point out that the district court also spoke in chambers with Noah and Lindsay about “how things were going at their grandparents’ house[.]” at which time they voiced their “agreement with the guardianship recommendation[.]” Regardless of whether Lindsay actually used the term “comfortable” with the social worker or the court, we find Mother’s argument to be unconvincing. Any imprecision by the court in paraphrasing Lindsay’s feelings is harmless.

C. YFS’ Reasonable Efforts

Mother also challenges the court’s finding that “YFS has made reasonable efforts to . . . eliminate the children’s need for . . . [an] out of home placement.” *See* N.C. Gen. Stat. § 7B-906.1(e)(5) (2013). However, this finding is supported by the evidence. Specifically, the YFS social worker testified regarding her interactions with Mother and received into evidence a “Reasonable Efforts Report.” The report details the social worker’s contact with Mother since the previous review hearing in April 2014 showing that the social worker was extensively involved in the scheduling and supervision of visits between Mother and the children in April and May 2014, that she contacted Mother to inform her of medical issues with the children, and that she coordinated

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Mother's therapeutic visitation with the children's therapist. The court incorporated the "Reasonable Efforts Report" by reference into its order. Accordingly, Mother's argument is overruled.

IV. Sufficiency of Findings Under N.C. Gen. Stat. § 7B-906.1

[3] Mother claims that the district court's order lacks certain findings of fact required by the permanency planning statute, N.C. Gen. Stat. § 7B-906.1 (2013).

A. Guardians' Financial Resources

Mother first contends the court awarded guardianship to Mr. and Ms. Smith without properly verifying that they "will have adequate resources to care appropriately for the juvenile[s]" as required by N.C. Gen. Stat. § 7B-906.1(j) (2013). *See also* N.C. Gen. Stat. § 7B-600(c) (2013). The order includes the following pertinent findings:

42. This Court questioned [Mr. and Ms. Smith] pursuant to NCGS §7B-600.

43 [Mr. and Ms. Smith] understand the legal and financial obligations of guardians.

44. [Mr. and Ms. Smith] are fit and proper people to have the care, custody, and control of [Noah] and [Lindsay] through a guardianship arrangement.

45. [Mr. and Ms. Smith] are ready, willing, and able to . . . fulfill the duties and responsibilities of legal guardians.

Mother argues that these findings and the evidence they are based on are not sufficient to meet the requirements of N.C. Gen. Stat. 7B-906.1(j). We disagree.

This Court has previously held "that the Juvenile Code does not 'require that the court make any specific findings in order to make the verification' prescribed by N.C. Gen. Stat. § 7B-906.1(j). *In re J.E.*, 182 N.C. App. 612, 617, 643 S.E.2d 70, 73 (2007).² It is sufficient that the court receives and considers evidence that the guardians understand the legal significance of the guardianship. *Id.* Here, the court made explicit findings of Mr. and Ms. Smith's understanding of and ability to fulfill their

2. *In re J.E.* was decided under a previous version of the statute, N.C. Gen. Stat. § 7B-907(f), but the applicable language in that version is almost identical to the applicable language in N.C. Gen. Stat. § 7B-906.1(j). *See* 2013 N.C. Sess. Laws 129, sects. 25, 26; 2003 N.C. Sess. Laws 140, sect. 9(d).

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financial responsibilities as guardians. Both Mr. and Ms. Smith affirmed to the court their willingness to “be responsible for the children’s physical, emotional and educational and mental well-being up until the time they turn 18.” The YFS court summary also states that Mr. and Ms. Smith “are willing and able to provide a long term home for the children through guardianship.” Having “spoken in depth” with Mr. and Ms. Smith “about meeting the requirements and responsibilities” of guardianship, the social worker affirmed her belief that they had “the means to support the children[.]” Such evidence more than suffices to support a verification under N.C. Gen. Stat. § 7B-906.1(j). *See In re J.E.*, 182 N.C. App. at 616-17, 643 S.E.2d at 73. Mother’s argument is overruled.

B. Ceasing Reunification Efforts

Mother also claims that the district court improperly ceased reunification efforts without making the necessary findings under N.C. Gen. Stat. § 7B-906.1(d)(3) (2013), requiring the court to consider “[w]hether efforts to reunite the juvenile[s] with either parent would be futile or inconsistent with the juvenile[s’] safety and need for a safe, permanent home within a reasonable period of time.” *Id.*

We agree with Mother that the order effectively ceases reunification efforts by (1) eliminating reunification as a goal of Noah and Lindsay’s permanent plan, (2) establishing a permanent plan of guardianship with Mr. and Ms. Smith, and (3) transferring custody of the children from YFS to their legal guardians.³ *Cf. In re A.E.C.*, 2015 N.C. App. LEXIS 14, *11 (N.C. Ct. App. Jan. 20, 2015) (noting “the order need not explicitly cease reunification efforts”); *In re A.P.W.*, __ N.C. App. __, __, 741 S.E.2d 388, 391 (2013) (finding an implicit ceasing of reunification efforts where the court changed the permanent plan to adoption and ordered DSS to seek termination of parental rights). However, we also believe and, therefore, hold that the findings exhibit that the trial court considered the factor.

In addressing the equivalent statutory requirement for ceasing reunification efforts under N.C. Gen. Stat. § 7B-507(b)(1), our Supreme Court has explained that “[t]he trial court’s written findings must address the statute’s concerns, but need not quote its exact language.” *In re A.E.C.*, 2015 N.C. App. LEXIS 14 at *11 (*quoting In re L.M.T.*, 367 N.C. 165, 167-68, 752 S.E.2d 453, 455 (2013)). In other words, the findings must “‘make clear that the trial court considered the evidence in light of

3. Because the order removed Noah and Lindsay from “the custody or placement responsibility” of YFS, the provisions of N.C. Gen. Stat. § 7B-507(b) (2013) do not apply.

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whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.'" *Id.*

Here, the trial court's findings refer to Mother's persistent "failure to comply with recommendations concerning her use of prescription pain pills[;]" her dishonesty about her continued contact with her live-in boyfriend and failure to appreciate the risk domestic violence "poses to herself and her children[;]" and her refusal to accept responsibility for her actions or acknowledge a problem with substance abuse, despite "a history of court involvement [that] includes at least 6 child custody cases which date back to the 1990s and span multiple counties and states." The order also includes several findings directly pertaining to the prospects for reunification:

27. [Mother] is either unwilling or unable to apply the information, skills, and strategies she has learned through various services to her daily life and interactions with her children. . . .

. . . .

49. [Mother] is not a fit and proper person to have the care, custody, and control of the children.

. . . .

51. The children cannot be reunified with [Mother] within six months or in the foreseeable future.

52. It is contrary to the children's best interest and contrary to their need for a safe and permanent home to be reunified with either parent.

At minimum, these findings "embrace[] the substance" of the statutory provisions in N.C. Gen. Stat. § 7B-906.1(d)(3). *In re L.M.T.*, 367 N.C. at 169, 752 S.E.2d at 456. Accordingly, Mother's argument is overruled.

V. Visitation Order

[4] In her final argument, Mother challenges the visitation schedule ordered by the district court as "too vague and ill-defined." The court scheduled a review hearing and awarded Mother visitation pending the hearing as follows:

- [Mother's] visitation shall be supervised by the family therapist, Dr. Tracy Masiello, in a therapeutic setting.

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- [Mother] is entitled to at least one visitation session per month for a minimum of one hour.
- Sessions may be longer and/or more frequent if the therapist recommends.
- [Mother] is responsible for contacting the family therapist at least once per month to participate in scheduling visitation appointments.
- [Mother] shall respond to messages from the therapist within 48 hours (2 days).

The order also declares the court's intention to "enter a detailed visitation plan for each parent" following the 10 September 2014 review hearing.

Mother argues that the visitation order fails to designate the time and place of the visits and thus does not provide the "minimum outline of visitation" required by *In re E.C.*, 174 N.C. App. 517, 523, 621 S.E.2d 647, 652 (2005) and its progeny. Our decision in *In re E.C.* relied on a version of N.C. Gen. Stat. § 7B-905(c) that required an "appropriate visitation plan . . . expressly approved by the court." In *In re E.C.*, we determined that this statutory language meant "[a]n appropriate visitation plan must provide for a minimum outline of visitation, such as the time, place, and conditions under which visitation may be exercised." 174 N.C. App. at 523, 621 S.E.2d at 652.

However, since our decision in *In re E.C.*, G.S. 7B-905(c) was amended (in 2013) to remove the language requiring that the plan be "expressly approved by the court[.]" and a new statute governing visitation in dispositional orders was enacted, G.S. 7B-905.1(b),(c), which only requires the order to account for "the minimum frequency and length of visits and whether the visits shall be supervised." See 2013 N.C. Sess. Laws 129, Sects. 23, 24 (June 19, 2013). These changes became effective 1 October 2013 *before* the trial court's August 2014 order and are applicable to the present case. By enacting G.S. 7B-905.1 and by not including the language that was in former G.S. 7B-905(c), we believe that the General Assembly intended to eliminate any requirement that the trial court include in its order the particular time or place for such visitations but only require the trial court to provide a framework for such visitations. Therefore, *In re E.C.* has been abrogated by the statutory amendment to the extent that it holds that a trial court *must* provide for the time, place, and conditions of visitation in an order allowing visitation.

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Here, the trial court accounted for the minimum frequency and length of the visitation (one hour, once per month) and provided for the visitations to be supervised by the family therapist (Dr. Masiello). The trial court left it to Mother to coordinate with Dr. Masiello regarding these visits. We hold that the trial court's order meets these minimum requirements for visitation, and this argument is overruled.

VI. Conclusion

For the foregoing reasons, we affirmed the trial court's "Permanency Planning Review and Guardianship Order[.]"

AFFIRMED.

Judges STROUD and HUNTER, JR. concur.

TONY HAROLD POPE, ADMINISTRATOR OF THE ESTATE OF
SUSAN LANIER FRIES, PLAINTIFF
v.
BRIDGE BROOM, INC., DEFENDANT

No. COA14-221

Filed 7 April 2015

1. Evidence—accident reconstruction—expert opinion—reliability

The trial court did not err in a negligence case by admitting an expert's accident reconstruction testimony under N.C.G.S. 8C-1, Rule 702 that in his expert opinion, decedent's husband was "the cause of this accident." Plaintiff failed to show that the expert's testimony was unreliable. Also, plaintiff did not further challenge the admissibility of the expert's testimony.

2. Negligence—jury instructions—intervening negligence—superseding negligence

The trial court did not err in a negligence case by instructing the jury on intervening or superseding negligence. Because the issue was properly submitted to the jury, plaintiff's contention that the lack of evidence of intervening or superseding negligence entitled plaintiff to a directed verdict, to JNOV, or a new trial was also rejected.

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3. Negligence—jury instructions—negligence per se—Manual for Uniform Traffic Control Devices

The trial court did not err by denying plaintiff's request for a jury instruction on negligence per se or by denying his motions for a directed verdict, JNOV, and a new trial based on negligence per se. Even assuming, without deciding, that defendant had a duty to comply with the Manual for Uniform Traffic Control Devices (MUTCD), the portions of the MUTCD that plaintiff suggested were violated did not create specific duties sufficient to be the basis for a claim of negligence per se. Further, because non-mandatory provisions of the MUTCD are optional, they do not provide a duty to be obeyed. While noncompliance with non-mandatory provisions may be relevant to a claim of negligence, such noncompliance does not constitute negligence per se.

Appeal by plaintiff from judgment entered 19 August 2013 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 May 2014.

DeVore Acton & Stafford, PA, by Derek P. Adler and Fred W. DeVore, III, for plaintiff-appellant.

McAngus, Goudelock & Courie, P.L.L.C., by Colin E. Scott, for defendant-appellee.

GEER, Judge.

Plaintiff Tony Harold Pope, as administrator of decedent Susan Lanier Fries' estate, appeals from a judgment entered on a jury verdict in defendant's favor, finding defendant was not liable in negligence. Mrs. Fries, who was riding on a motorcycle with her husband, was thrown from the motorcycle and died after her husband tried to avoid one of defendant's trucks that was at the rear of a street-sweeping operation. On appeal, plaintiff primarily argues that the trial court erred in denying his motion for a directed verdict against defendant on the grounds that the evidence was undisputed that defendant's negligence was at least a proximate cause of Mrs. Fries' death. However, defendant presented evidence materially indistinguishable from the undisputed facts of *Pintacuda v. Zuckeberg*, 159 N.C. App. 617, 624-26, 583 S.E.2d 348, 353-54 (2003) (Timmons-Goodson, J., dissenting), *rev'd for reasons stated in dissent*, 358 N.C. 211, 598 S.E.2d 776 (2004), in which our Supreme Court upheld entry of a directed verdict in *the defendant's favor* because the evidence

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established intervening negligence by the plaintiff motorcycle driver. Since the undisputed evidence in *Pintacuda* was sufficient to establish intervening negligence as a matter of law, defendant's evidence in this case, if believed by the jury, was sufficient to allow the jury to find that the negligence of Mrs. Fries' husband constituted intervening negligence warranting a verdict in defendant's favor. Consequently, the trial court, in this case, properly denied plaintiff's motion for a directed verdict.

Facts

This case arose out of an accident on Independence Boulevard in Charlotte, North Carolina. In the area around where the accident occurred, there are three northbound lanes and three southbound lanes that are divided by a median. Traveling southbound, the highway curves to the southwest, and there are trees abutting the right shoulder of the highway. The speed limit is 55 m.p.h., and lanes are about 12 feet wide.

On the evening of 10 September 2011, defendant was performing a street sweeping operation that involved four of defendant's vehicles traveling southbound on the left hand side of Independence Boulevard. Michael Marshall, then employed by defendant, was at the tail of the operation, driving a pickup truck designed to absorb substantial rear end impact. Mounted on the bed of Mr. Marshall's truck was a tall advanced warning sign bearing a large flashing arrow or message indicating to drivers approaching from behind the street sweeping operation that they would have to move over one lane to the right. About 150 feet in front of Mr. Marshall, there was another attenuator truck with a similar mounted sign ("the front attenuator truck"), and in front of that second truck was a sweeping and vacuuming vehicle. There was also a vehicle in front of the sweeping vehicle that was picking up larger debris.

The weather was clear that evening, and sometime after 9:30 p.m. the sweeping operation had crested a hill on Independence Boulevard just south of a bridge over Pecan Avenue, and was moving between five and 20 m.p.h. Mr. Marshall's truck was either partially or completely in the left lane of travel, even though the left shoulder was wide enough for Mr. Marshall to be traveling completely on the shoulder. The other Bridge Broom vehicles were traveling either on the left shoulder or in the left lane.

Yawo Sedjro was also traveling in his car, a green van, southbound in the left lane. As he came up the hill just after the Pecan Avenue bridge, Mr. Sedjro came quickly upon Mr. Marshall's vehicle obstructing the left lane of travel and slammed on his brakes. Mr. Sedjro first slowed to about 20 to 25 m.p.h. and then came to a complete stop, becoming

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trapped behind Mr. Marshall's truck. He signaled and waited for an opportunity to safely move over to the center lane. Samuel Flores was traveling southbound in his vehicle when he came upon Mr. Sedjro and defendant's sweeping operation. Mr. Flores also slammed on his brakes to let Mr. Sedjro move over and in case Mr. Flores needed to move over into the right lane.

Darrell Fries was also driving southbound on Independence Boulevard on his motorcycle with Mrs. Fries riding on the back. Mr. and Mrs. Fries were traveling in the left lane when Mr. Fries saw brake lights up ahead and the flashing sign from one of the attenuator trucks. Mr. Fries "wasn't sure what was happening in the left lane," but he believed he "had to move over" and "started making adjustments." After moving over to the center lane, he began to brake, but his motorcycle started sliding. The motorcycle skidded for 195 feet before it fell over. Mrs. Fries was thrown about 30 feet from where the motorcycle fell over, she slammed into the back of Mr. Flores' car, and she died. Mr. Fries suffered serious injury. There were no other injuries or accidents.

At trial, plaintiff offered testimony from, among others, Daren Marceau, who testified as an expert in "traffic engineering and crash investigation, motorcycle operations and human factors with respect to driving in motorway environments." Mr. Marceau testified that "the mobile sweeping operation being conducted by Bridge Broom's employees at the time of the crash was in violation of state and federal standards" as promulgated in the Manual for Uniform Traffic Control Devices ("MUTCD"), primarily because "Mr. Marshall failed to properly position his truck on the shoulder[,] . . . [the driver of the front attenuator truck] failed to properly space the two [attenuator] trucks along the roadway[, and] . . . Bridge Broom failed to place advanced warning signs or changeable message signs before the work zone." He concluded that "the failure of Bridge Broom to do the[se] things . . . was at least a cause of the crash that killed Susan Fries." Plaintiff introduced into evidence relevant portions of the MUTCD. However, plaintiff did not offer the testimony of an accident reconstruction expert.

Plaintiff filed a motion in limine to exclude the testimony of defendant's expert in accident reconstruction, Timothy Cheek. The trial court denied the motion and allowed Mr. Cheek to testify regarding his analysis of the accident. Mr. Cheek did not disagree with Mr. Marceau's opinions regarding the location of defendant's vehicles at the time of the accident. However, Mr. Cheek testified that in his opinion, based in large part upon his measurements and calculations at the location of the accident, that the reason for Mrs. Fries' death was Mr. Fries' inadequate

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braking of the motorcycle. Plaintiff cross-examined Mr. Cheek about the accuracy of these measurements and calculations.

At the close of all the evidence, plaintiff made a motion for a directed verdict in his favor. The trial court denied the directed verdict motion and also denied a request by plaintiff for a jury instruction on negligence per se. However, the trial court granted defendant's request for an instruction on intervening negligence.

The trial court submitted two issues to the jury: (1) "Was the negligence of Bridge Broom a proximate cause of the death of Susan Fries?" and (2) if so, "What amount of damages is the Estate of Susan Fries entitled to recovery [sic] for her wrongful death?" The jury answered the first question in the negative. After the verdict was read, plaintiff made a motion for judgment notwithstanding the verdict ("JNOV") on the grounds that the "overwhelming weight of the evidence" supported the conclusions (1) that defendant should be liable based on negligence per se and (2) that Mr. Fries' actions were reasonably foreseeable. After the trial court denied the JNOV motion, plaintiff moved the trial court for "essentially a mistrial" on the same bases as the JNOV. The trial court also denied that motion. Plaintiff timely appealed to this Court.

I

[1] Plaintiff first challenges the trial court's admission of Mr. Cheek's accident reconstruction testimony, arguing that his opinions were inadmissible under Rule 702 of the Rules of Evidence. Mr. Cheek testified that, in his expert opinion, Mr. Fries was "the cause of this accident." According to Mr. Cheek, the accident occurred, and Mrs. Fries was killed, because Mr. Fries only used his rear brake -- if he had used both his front and rear brakes, Mr. Fries would have been able to safely stop.

We review a trial court's ruling regarding the admission of expert testimony for abuse of discretion. *State v. McGrady*, ___ N.C. App. ___, ___, 753 S.E.2d 361, 365, *disc. review allowed*, 367 N.C. 505, 758 S.E.2d 864 (2014). A trial court abuses its discretion if its decision is " 'manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* at ___, 753 S.E.2d at 365 (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

The legislature's 2011 amendment to Rule 702(a) of the Rules of Evidence provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert

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by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

Our Rule 702 was amended to mirror the Federal Rule 702, which itself “ ‘was amended . . . to conform to the standard outlined in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)].’ ” *McGrady*, ___ N.C. App. at ___, 753 S.E.2d at 367 (quoting Committee Counsel Bill Patterson, 2011-2012 General Assembly, *House Bill 542: Tort Reform for Citizens and Business* 2-3 n.3 (8 June 2011)).

In light of our legislature’s amendment, this Court recognized that “it is clear that amended Rule 702 should be applied pursuant to the federal standard as articulated in *Daubert*.” *Id.* at ___, 753 S.E.2d at 367. *Daubert* explained that the touchstone for admissibility is reliability, and “ ‘ “scientific knowledge” establishes a standard of evidentiary reliability.’ ” *Id.* at ___, 753 S.E.2d at 367 (quoting *Daubert*, 509 U.S. at 590, 125 L. Ed. 2d at 481, 113 S. Ct. at 2795). For cases commenced after the effective date of the Rule 702 amendment, this generally means a departure from the analysis set forth under *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004), which was based on the existing law that, under the prior version of Rule 702, “North Carolina [was] not . . . a *Daubert* jurisdiction.”¹

Consistent with the application of Federal Rule 702 in federal courts, under North Carolina’s amended Rule 702, trial courts must conduct a three-part inquiry concerning the admissibility of expert testimony:

Parsing the language of the Rule, it is evident that a proposed expert’s opinion is admissible, at the discretion of the trial court, if the opinion satisfies three requirements. First, the witness must be qualified by “knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. Second, the testimony must be relevant,

1. The amended Rule 702 applies here because the complaint was filed about a month after the effective date of the amendment. *See* 2011 Sess. Laws ch. 283, ss. 1.3, 4.2.

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meaning that it “will assist the trier of fact to understand the evidence or to determine a fact in issue.” *Id.* Third, the testimony must be reliable. *Id.*

In re Scrap Metal Antitrust Litig., 527 F.3d 517, 528-29 (6th Cir. 2008). “While there is inevitably some overlap among the basic requirements . . . they remain distinct concepts and the courts must take care not to conflate them.” *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004).

In this appeal, plaintiff does not make any challenge to Mr. Cheek’s testimony under the first or second prongs of the Rule 702 inquiry, but instead focuses exclusively on whether Mr. Cheek’s opinions were reliable. With respect to that part of the Rule 702 inquiry,

Rule 702 guides the trial court by providing general standards to assess reliability: whether the testimony is based upon “sufficient facts or data,” whether the testimony is the “product of reliable principles and methods,” and whether the expert “has applied the principles and methods reliably to the facts of the case.” [Fed. R. Evid. 702.] In addition, *Daubert* provide[s] a non-exclusive checklist for trial courts to consult in evaluating the reliability of expert testimony. . . . The test of reliability is “flexible,” and the *Daubert* factors do not constitute a “definitive checklist or test,” but may be tailored to the facts of a particular case. *Kumho [Tire Co. v. Carmichael]*, 526 U.S. [137,] 150, [143 L. Ed. 2d 238, 251], 119 S. Ct. 1167[, 1175 (1999)].

In re Scrap Metal Antitrust Litig., 527 F.3d at 529.

Daubert’s five non-exclusive factors for trial courts to use in assessing the reliability of scientific testimony include the following:

1) whether the expert’s scientific technique or theory can be, or has been, tested; 2) whether the technique or theory has been subject to peer review and publication; 3) the known or potential rate of error of the technique or theory when applied; 4) the existence and maintenance of standards and controls; and 5) whether the technique or theory has been generally accepted in the scientific community.

United States v. Beverly, 369 F.3d 516, 528 (6th Cir. 2004). Additionally, in applying *Daubert*, federal courts have recognized other factors relevant to determining the reliability of expert testimony, including whether the

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expert proposes to testify about matters growing naturally and directly out of research the expert has conducted independent of the litigation, or, conversely, whether the expert has developed opinions expressly for purposes of testifying; whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion; whether the expert has adequately accounted for obvious alternative explanations; whether the expert is as careful in his testimony as he would be outside the context of his paid litigation consulting; and whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See* Fed. R. Evid. 702, Advisory Committee Notes on the 2000 Amendments (citing cases in support of factors).

Although this case is only the second time our appellate courts have discussed the application of the *Daubert* standard adopted by our amended Rule 702, federal and other state courts, of course, have been applying the *Daubert* analysis for more than two decades. Nevertheless, although plaintiff challenges Mr. Cheek's testimony on the basis that it failed to meet the requirements of each of Rule 702's subsections, the only authority plaintiff cites in support of his contentions is Rule 702 and the standard of review. "As defendant fails to cite any legal authority in support of [this] argument, that argument may be deemed abandoned." *State v. Locklear*, 180 N.C. App. 115, 119, 636 S.E.2d 284, 287 (2006); N.C.R. App. P. 28(a). Nonetheless, even considering plaintiff's bare assertions, we hold he has failed to show that the trial court abused its discretion.

At trial, Mr. Cheek testified that the facts and data he used to form his opinion came from (1) the police file, which included statements, reports, and photographs from the scene; (2) physical evidence from and observations of the scene; and (3) the depositions of the witnesses at the scene, including those of Mr. Marshall, Mr. Sedjro, Mr. Chavez, and Mr. Fries. These sources provided Mr. Cheek with the following facts about the case: (1) at the time of the accident, Mr. Marshall's truck was not completely on the left shoulder; (2) the height of the sign on Mr. Marshall's truck was 13 feet; (3) the speed of Mr. Marshall's truck was less than 10 m.p.h.; (4) Mr. Fries' motorcycle was a 2003 Harley Davidson; (5) Mr. Fries "was in the left-hand lane when he came around the curve and saw the arrow board" on Mr. Marshall's truck and moved over to the center lane; and (6) other cars were able to stop without wrecking or leaving skid marks. His review of the information available prior to trial also provided him with an understanding of the geography of the area of the accident; the start and end points of the skid marks from Mr. Fries'

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motorcycle; the point where the motorcycle was laid down and came to a rest; and the positions of Mr. Sedjro's and Mr. Chavez' vehicles.

Mr. Cheek's opinion was primarily based on a comparison of Mr. Fries' sight distance and the distance in which Mr. Fries could have safely braked. Mr. Cheek took two measurements to determine Mr. Fries' sight distance, which Mr. Cheek testified was "more than 660 feet[.]" With one measurement, relying on Mr. Fries' deposition testimony that he saw Mr. Marshall's truck while in the left lane, Mr. Cheek placed his car on the left shoulder of Independence Boulevard at the stipulated location of the accident and walked back on that shoulder to the farthest point where he could still see his car, and he measured a driving distance of 800 feet within which Mr. Fries could "see and react" to any danger posed by Mr. Marshall's truck. As part of the measurement, Mr. Cheek stooped down to mimic Mr. Fries' height while driving the motorcycle. Mr. Cheek explained, given that the sign on the rear of Mr. Marshall's truck was 13 feet, much taller than Mr. Cheek's car which only came up to his chest, this 800 foot estimate was conservative. For the other sight distance measurement, which relied on physical evidence suggesting that Mr. Fries was closer to the right lane when he reacted to Mr. Marshall's vehicle, Mr. Cheek used Google's Street View software and determined that if Mr. Fries were traveling in the far right lane, he could have seen Mr. Marshall's truck from at least 580 feet away. Mr. Cheek explained that this estimate was "very conservative."

Mr. Cheek also determined that Mr. Fries' skid marks were caused by Mr. Fries locking his rear brake and failing to apply his front brake. Assuming Mr. Fries was traveling 55 m.p.h., and taking into account Mr. Fries' motorcycle's braking capacity, Mr. Cheek calculated that the distance in which Mr. Fries could have stopped had he used both brakes was 133 feet. Mr. Cheek also testified that the fact that no other automobiles were involved in a wreck supported the conclusion that Mr. Fries could have safely reacted to any danger posed by Mr. Marshall's vehicle and come to a complete stop if he had applied his front brake.

Plaintiff cross-examined Mr. Cheek about the possible hazards posed by Mr. Marshall's truck, his sight distance calculations, his calculation of Mr. Fries' motorcycle's braking capabilities, and proper motorcycle braking technique. In response to a question whether "[a]s a general principle [it is] true that . . . automobiles stop more quickly than motorcycles," Mr. Cheek explained that Mr. Fries' motorcycle can safely brake quicker than the average automobile.

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Plaintiff first contends, under Rule 702(a), that the testimony that plaintiff had “800 feet of driving space to see and react” was not based on sufficient facts or data, because the points that Mr. Cheek used to measure that distance – from one point on the left shoulder to another point on the left shoulder – were different from the locations of Mr. Fries’ motorcycle and Mr. Marshall’s truck prior to the accident. Plaintiff argues that Mr. Fries was actually in the middle lane, while Mr. Marshall was straddling the shoulder and left lane. Plaintiff also contends the measurement was deficient in facts or data because it failed to account for when Mr. Fries “could decipher that the attenuator truck was actually within the left lane” and recognize that it posed a hazard.

Subsection (a)(1) of Rule 702 “calls for a quantitative rather than qualitative analysis.” *See* Fed. R. Evid. 702, Advisory Committee Notes on the 2000 Amendments. That is, the “requirement that expert opinions be supported by ‘sufficient facts or data’ means ‘that the expert considered sufficient data to employ the methodology.’ ” *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 808 (7th Cir. 2013) (quoting *Stollings v. Ryobi Techs., Inc.*, 725 F.3d 753, 766 (7th Cir. 2013)). *See also United States v. Crabbe*, 556 F. Supp. 2d 1217, 1223 (D. Col. 2008) (“[T]he inquiry examines only whether the witness obtained the amount of data that the methodology itself demands.”).

Consequently, “ ‘[a]s a general rule, questions relating to the bases and sources of an expert’s opinion affect only the weight to be assigned that opinion rather than its admissibility.’ ” *Southwire Co. v. J.P. Morgan Chase & Co.*, 528 F. Supp. 2d 908, 934 (W.D. Wis. 2007) (quoting *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 372 F. Supp. 2d 1104, 1119 (N.D. Ill. 2005)). “In other words, th[is] Court does not examine whether the facts obtained by the witness are themselves reliable – whether the facts used are qualitatively reliable is a question of the *weight* to be given the opinion by the factfinder, not the *admissibility* of the opinion.” *Crabbe*, 556 F. Supp. 2d at 1223.

Additionally, “experts may rely on data and other information supplied by third parties. . . even if the data were prepared for litigation by an interested party. Unless the expert’s opinion is too speculative, it should not be rejected as unreliable merely because the expert relied on the reports of others.” *Southwire Co.*, 528 F. Supp. 2d at 934 (internal citation omitted). An expert may rely on deposition statements made by other witnesses in developing the factual basis of his opinion. *See Figueroa v. Boston Scientific Corp.*, 254 F. Supp. 2d 361, 367 (S.D. N.Y.

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2003) (holding expert's opinion sufficiently reliable in part where expert "reviewed witness depositions, medical records, and scientific literature in forming his expert opinion in this case").

Here, Mr. Cheek relied on Mr. Fries' deposition in which Mr. Fries testified that he was in the left lane when he saw the arrow board on Mr. Marshall's truck, which was not completely on the left shoulder. Mr. Cheek also relied on the heights of the sign on Mr. Marshall's truck and of Mr. Fries' motorcycle, which are undisputed. There is no dispute that these facts were sufficient for Mr. Cheek to calculate a sight distance measurement of 800 feet. Any dispute concerning whether Mr. Cheek used the correct data points goes to the quality and therefore the credibility of the measurement and not its admissibility. See *Intellectual Ventures I LLC v. Canon Inc.*, 36 F. Supp. 3d 449, 466 n.11 (D. Del. 2014) ("Using his own selected references, Dr. Fossum disputes the references selected and calculations performed by Dr. Afromowitz, concluding that Dr. Afromowitz's analysis is . . . not based on sufficient facts or data. The court will not weigh the credibility of the parties' experts[.]"); *Crabbe*, 556 F. Supp. 2d at 1223 ("The witness' testimony that he or she obtained a measurement of that distance is sufficient to satisfy the 'facts and data' element of Rule 702 for that component of the methodology."). See also *Glass v. Anne Arundel Cnty.*, 38 F. Supp. 3d 705, 715-16 (D. Md. 2014) ("Because all these facts are supported by the record, the data on which [the expert] relied in writing portions of [his] report based on these three facts are relevant to the case. [The plaintiff's] objections to [the expert's] conclusions from his calculations -- and to [the expert's] failure to take other data into account -- go to the weight of the report, not its admissibility[.]").

Further, the 800 feet of driving space "to see and react" to any perceived danger posed by Mr. Marshall's truck does, in fact, take into account the point at which Mr. Fries could decipher that danger, as it takes into account the point when Mr. Fries reacted to Mr. Marshall's truck. Mr. Cheek testified in his deposition that his calculations considered "the time it takes to recognize that a vehicle is completely stopped" which is "about a second." Mr. Cheek also relied upon the fact that Mr. Fries testified he moved over to the center lane when he saw Mr. Marshall's arrow board, which was partially in the left lane.

Plaintiff next argues that Mr. Cheek's 800 foot measurement was the product of unreliable principles and methodology, contrary to Rule 702(a)(2), because Mr. Cheek used Google Earth to measure the sight

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distance. Plaintiff points to an image generated by Google Earth's line of sight estimator² showing that, from the center lane on the Pecan Avenue bridge to the stipulated point where the accident occurred, the line of sight is obstructed by trees. Plaintiff did not introduce this image at trial.

The requirement that expert testimony must be based on "scientific knowledge," *McGrady*, ___ N.C. App. at ___, 753 S.E.2d at 367 (quoting *Daubert*, 509 U.S. at 590, 125 L. Ed. 2d at 481, 113 S. Ct. at 2795), means that the principles and methods used to form that testimony must be grounded in the scientific method, *Daubert*, 509 U.S. at 590, 125 L. Ed. 2d at 481, 113 S. Ct. at 2795. In other words, the principles and methods must be capable of generating "testable hypotheses that are then subjected to the real world crucible of experimentation, falsification/validation, and replication." *Perry v. Novartis Pharms. Corp.*, 564 F. Supp. 2d 452, 459 (E.D. Pa. 2008) (quoting *Caraker v. Sandoz Pharm. Corp.*, 188 F. Supp. 2d 1026, 1030 (S.D. Ill. 2001)).

We note that plaintiff conceded at trial that the measurement of 800 feet from the left shoulder was accurate, using Google Earth, and on appeal contends that "the approximation does not take into account Google Earth's additional evidence that the line of sight from the center lane . . . is obstructed." It appears that the specific contention that Mr. Cheek used unreliable principles and methods to determine the 800 foot sight distance measurement is based on the fact that, had Mr. Cheek measured the sight distance from the center lane on the Pecan Avenue bridge, his conclusion would have been different.

Plaintiff, however, does not suggest that the technique Mr. Cheek used to arrive at the 800 foot measurement is itself the product of unscientific methodology, and given that Mr. Cheek used Google Earth to calculate the distance he could see from the left shoulder, plaintiff rightfully concedes that this measurement is reliable. See *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1218 n.2 (10th Cir. 2007) (taking judicial notice of online distance calculation relying on Google Maps data). Rather, the only reason plaintiff gives that Mr. Cheek's 800-foot sight distance measurement is unreliable is essentially that qualitatively unreliable data points were used, an attempt to take plaintiff's prior contention concerning insufficient facts and data and recast it in terms of principles and methods. Because we have concluded that the

2. Plaintiff apparently showed this image to the trial court during the hearing on the admissibility of Mr. Cheek's testimony.

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trial court did not err in admitting Mr. Cheek's testimony on the basis of insufficient facts or data, we likewise overrule this contention.³

Plaintiff additionally contends that Mr. Cheek's opinion is based on unreliable principles or methods because, according to plaintiff, at his deposition "[Mr.] Cheek admitted that reaction time was NOT factored into his analysis." Although Mr. Cheek stated at his deposition that "reaction time isn't really discussed in here [in my report]," he also explained at his deposition and at trial that, assuming Mr. Fries was traveling 55 m.p.h. when he first saw Mr. Marshall's truck, and assuming he saw the truck at a distance of 800 feet out, he would have had "an available time of [at least] 10 seconds to do something."

At trial, Mr. Cheek testified that "Mr. Fries, as he approached the collision area . . . responded at a certain point in time." Mr. Cheek was able to use skid marks left by Mr. Fries' motorcycle (as measured by the police) to determine the precise point at which Mr. Fries reacted to the vehicles ahead. Mr. Cheek then used that point to determine whether, had Mr. Fries used both his front and his back brakes, he could have avoided the collision. Consequently, even assuming, as plaintiff suggests, that reaction time is an essential part of an accident reconstruction expert's testimony, it was reasonable for the trial court to conclude that Mr. Cheek accounted for Mr. Fries' reaction time when reaching his opinion that Mr. Fries could have avoided the accident by proper braking. *See Dugle ex rel. Dugle v. Norfolk S. Ry. Co.*, 683 F.3d 263, 270 (6th Cir. 2012) ("The district court found the record devoid of evidence that [the defendant's] train crew could have avoided the collision [with the plaintiff-officer's vehicle] after the crew first spotted [the plaintiff's] cruiser. But . . . a reasonable inference arises from both [the investigating officer's] accident report and the testimony of [the defendant's] own experts . . . that [the plaintiff] could have braked in time to avoid the collision if he had been warned when his cruiser first became visible to the train crew.").

Plaintiff also contends that Mr. Cheek's opinion that Mr. Fries was the only direct cause of the accident uses unreliable principles and methods because his opinion was based on the fact that "no other vehicles crashed." In his deposition, Mr. Cheek testified that "you can eliminate [Bridge Broom] as a direct cause of the crash because nobody else had

3. We note that had plaintiff introduced into evidence the Google Earth image showing an obstructed view from the center lane, then the jury could have resolved any discrepancy between the obstructed view that image conveyed and Mr. Cheek's sight distance conclusions.

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a crash[.]” At trial, however, Mr. Cheek explained that the fact that other vehicles “were able to stop . . . without leaving any skid marks” was important “in terms of the available sight distance [drivers] had, and the available distance that they had to respond to the work zone being out there.” He further testified that “there’s lots of research that shows that motorcycles can actually stop better than cars.” The fact that no other cars wrecked at the scene does not, therefore, itself represent a separate principle or methodology that Mr. Cheek employed to come to his conclusion, but other data or facts that corroborated his measurements and calculations. Plaintiff has, therefore, failed to show that the principles and methods Mr. Cheek used were unreliable under Rule 702(a)(2).

Lastly, plaintiff’s argument under Rule 702(a)(3) – that Mr. Cheek did not reliably apply the principles and methods to the facts of this case – reiterates plaintiff’s argument under Rule 702(a)(2) that Mr. Cheek improperly based his conclusion that Mr. Fries had enough notice to react to any perceived danger on the fact that there were no other wrecks. This argument is not sufficient to demonstrate that the trial court erred in concluding that Mr. Cheek’s opinion did not violate Rule 702(a)(3).

In sum, plaintiff has failed to show that Mr. Cheek’s testimony was unreliable. Because plaintiff does not further challenge the admissibility of Mr. Cheek’s testimony, we hold that the trial court did not abuse its discretion in admitting the testimony.

II

[2] Plaintiff next argues that the trial court erred in instructing the jury on intervening or superseding negligence. When instructing a jury in a civil case,

“the trial court has the duty to explain the law and apply it to the evidence on the substantial issues of the action.”
The trial court is permitted to instruct a jury on a claim or defense only “if the evidence, when viewed in the light most favorable to the proponent, supports a reasonable inference of such claim or defense.”

Estate of Hendrickson v. Genesis Health Venture, Inc., 151 N.C. App. 139, 151-52, 565 S.E.2d 254, 262 (2002) (quoting *Wooten v. Warren*, 117 N.C. App. 350, 358, 451 S.E.2d 342, 347 (1994)). Plaintiff contends that defendant presented insufficient evidence of intervening or superseding negligence. We disagree.

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A negligent act is the proximate cause of injury if the injury is caused by an event which is not “merely possible” but which rather is “reasonably foreseeable” on the part of the negligent actor. *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 234, 311 S.E.2d 559, 565 (1984). “[I]ntervening negligence[is] also referred to in our case law as superseding or insulating negligence[and] is an elaboration of a phase of proximate cause.” *Barber v. Constien*, 130 N.C. App. 380, 383, 502 S.E.2d 912, 914 (1998). “ ‘An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question.’ ” *Hairston*, 310 N.C. at 236, 311 S.E.2d at 566 (quoting *Harton v. Telephone Co.*, 141 N.C. 455, 462, 54 S.E.2d 299, 301 (1906)). “Insulating negligence means something more than a concurrent and contributing cause.” *Id.*

Our Supreme Court has explained:

The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury. Put another way, in order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it.

Adams v. Mills, 312 N.C. 181, 194, 322 S.E.2d 164, 173 (1984) (internal citations omitted).

Initially, we note that plaintiff cites *Adams* for the proposition that the type of accident here – which plaintiff likens to a chain-reaction collision – is inherently foreseeable. *Adams* explained that “[i]t is well settled that there may be more than one proximate cause of an injury. Where [a] second actor does not become apprised of the existence of a potential danger created by the negligence of an original tort-feasor until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident.” *Id.*, 322 S.E.2d at 172 (internal citation omitted).

Although the Court in *Adams* concluded that, in a series of wrecks, the second negligent actor in that case did not insulate the original tort-feasor from liability, that case also limited its holding: “Under the facts of this case, it cannot be said as a matter of law that defendant’s conduct

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in continuing to drive in a westerly direction down the two-lane paved road while blinded by the bright setting sun was reasonably unforeseeable to one in plaintiff's position. The risk of the intervention of this or other similar wrongful conduct is the very risk created by violation of the regulations governing stopping on the highway." *Id.* at 195, 322 S.E.2d at 173.

Here, on the other hand, Mr. Cheek's opinion that Mr. Fries caused the accident by failing to use his front brake, if believed by the jury, makes the facts of this case substantially the same as those in *Pintacuda*, in which the Supreme Court ultimately concluded that, as a matter of law, the negligent defendant was insulated from liability.⁴ In *Pintacuda*, it was undisputed that the plaintiff was riding his motorcycle under the speed limit in the left lane on the highway at least three car lengths behind the defendant's car when the plaintiff "saw the hood of defendant's car fly up." 159 N.C. App. at 618, 583 S.E.2d at 349-50. Afraid that he would "crash into defendant's car and either be thrown over that car or be impaled on the back of the car[.]" the plaintiff made a "split-second" decision to move over to another lane which he knew was clear. *Id.* at 619, 583 S.E.2d at 350. However, as he was attempting to avoid the defendant's car, "his motorcycle began to skid for unknown reasons and came down in the right-hand lane"; the plaintiff was thrown from his motorcycle and seriously injured. *Id.*

After the plaintiff in *Pintacuda* filed his complaint, the trial court granted summary judgment in favor of the defendant. On appeal, the issue was whether summary judgment was proper on the grounds that (1) the plaintiff was contributorily negligent or, in the alternative, (2) his actions constituted an unforeseeable cause that insulated defendant from liability. *Id.* at 622, 623, 583 S.E.2d at 351-52. A majority of the panel in *Pintacuda* reversed the summary judgment order after concluding that the evidence gave rise to genuine issues of material fact as to both intervening negligence and contributory negligence.

Then-Judge Timmons-Goodson dissented on the basis that the undisputed facts of that case were indistinguishable from those of *McNair v. Boyette*, 15 N.C. App. 69, 189 S.E.2d 590, *aff'd*, 282 N.C. 230, 192 S.E.2d 457 (1972).

This Court has previously stated that when a plaintiff has become aware that potential dangers have been created

4. We note that although *Pintacuda* is obviously pertinent to the issues raised in this case, neither party cited it.

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by the negligence of another, and then “by an independent act of negligence, brings about an accident,” the defendant is relieved of liability, “because the condition created by [the defendant] was merely a circumstance of the accident and not its proximate cause.” *McNair* . . . , 15 N.C. App. [at] 73, 189 S.E.2d [at] 593 I believe that defendant’s act of stopping his vehicle was merely a circumstance of the accident and not the proximate cause of plaintiff’s injuries.

. . . .

. . . A review of plaintiff’s testimony clearly places responsibility for the accident on him either “skidding on something” or hitting a lane reflector. Moreover, plaintiff’s testimony reveals that he was aware of the potential danger created by defendant’s accident, had sufficient time to apply his breaks [sic], safely merge into a different lane, and in an independent act, failed to maintain control of his motorcycle. Therefore, it is clear that there was an independent cause, apart from defendant’s collision, which resulted in plaintiff sustaining injuries.

Pintacuda, 159 N.C. App. at 624, 626, 583 S.E.2d at 353, 354 (Timmons-Goodson, J., dissenting). The Supreme Court reversed *Pintacuda* based on Judge Timmons-Goodson’s dissent. 358 N.C. at 211, 598 S.E.2d at 776.

Here, similar to the undisputed facts in *Pintacuda*, Mr. Cheek’s testimony, if found credible and entitled to weight, would permit the jury to find that Mr. Fries had the time, distance, and capability to safely brake and that the accident was due to Mr. Fries’ failure to use his front brake. Although plaintiff contends that defendant conceded the positioning of Mr. Marshall’s truck “created a foreseeable risk of a rear-end collision” for traffic approaching from behind the truck, such a concession merely provided sufficient facts to support a finding that Mr. Marshall’s truck created a foreseeable risk for some type of accident. It was not a concession that the particular accident here could not have been the result of some superseding cause.⁵

5. Plaintiff asserts that “[f]or Mr. Fries’ actions to supersede the negligence of the Defendant, this Court must rule as a matter of law that a highway driver’s failure to properly stop and/or avoid an improperly warned hazard is negligence such that it breaks the causal chain[.]” This assertion, however, mistakes this Court’s task on appeal, which is to determine whether there was sufficient evidence for the jury to decide whether any negligence on the part of defendant was insulated by a superseding cause.

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The trial court, therefore, did not err in instructing the jury on intervening or superseding negligence. Because the issue was properly submitted to the jury, we also reject plaintiff's contention that the lack of evidence of intervening or superseding negligence entitled plaintiff to a directed verdict, to JNOV, or a new trial.

III

[3] Plaintiff further argues that the trial court erred in rejecting his contention that Mr. Marshall violated the requirements of the MUTCD and that such violations constituted negligence per se. Specifically, plaintiff argues that the trial court erred in denying his request for a jury instruction on negligence per se and in denying his motions for a directed verdict, JNOV, and a new trial based on negligence per se.

The standard of review for motions for a directed verdict and JNOV is well established:

"The standard of review of the denial of a motion for a directed verdict and of the denial of a motion for JNOV are identical. We must determine 'whether, upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom and resolving all conflicts of any evidence in favor of the non-movant, the evidence is sufficient to be submitted to the jury.' " *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (internal citation omitted) (quoting *Denson v. Richmond County*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003)), *disc. review denied*, 363 N.C. 583, 682 S.E.2d 389 (2009).

"A motion for either a directed verdict or JNOV 'should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim.' " *Id.* (quoting *Branch v. High Rock Realty, Inc.*, 151 N.C. App. 244, 250, 565 S.E.2d 248, 252 (2002), *disc. review denied*, 356 N.C. 667, 576 S.E.2d 330 (2003)). "A 'scintilla of evidence' is defined as 'very slight evidence.' " *Everhart v. O'Charley's Inc.*, 200 N.C. App. 142, 149, 683 S.E.2d 728, 735 (2009) (quoting *Scarborough v. Dillard's Inc.*, 188 N.C. App. 430, 434, 655 S.E.2d 875, 878 (2008), *rev'd on other grounds*, 363 N.C. 715, 693 S.E.2d 640 (2009)).

Springs v. City of Charlotte, 209 N.C. App. 271, 274-75, 704 S.E.2d 319, 322-23 (2011). Further, where a trial court's decision pertaining to a

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motion for a new trial involves a question of law or a legal inference, the standard of review is de novo. *Bodie Island Beach Club Ass'n v. Wray*, 215 N.C. App. 283, 294, 716 S.E.2d 67, 77 (2011).

“[T]he general rule in North Carolina is that the violation of a [public safety statute] constitutes negligence *per se*. A public safety statute is one impos[ing] upon [the defendant] a specific duty for the protection of others.” *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 326, 626 S.E.2d 263, 266 (2006) (internal citation and quotation marks omitted). “The distinction, between a violation of a statute or ordinance which is negligence *per se* and a violation which is not, is one of duty. In the former the duty is to obey the statute, in the latter the duty is due care under the circumstances.” *Cowan v. Murrows Transfer, Inc.*, 262 N.C. 550, 554, 138 S.E.2d 228, 231 (1964).

Defendant suggests that any violation of the MUTCD by defendant could not be negligence *per se* because “Bridge Broom is a private actor, and North Carolina cases have only recognized a claim against the NCDOT, a government actor.” Although this Court has held that the North Carolina Department of Transportation can be held liable under a theory of negligence *per se* for violating the MUTCD, *Norman v. N.C. Dep’t of Transp.*, 161 N.C. App. 211, 218-19, 588 S.E.2d 42, 48 (2003), our appellate courts have not yet addressed whether a private actor’s non-compliance with the MUTCD can support a claim of negligence *per se*. However, even assuming, without deciding, that defendant had a duty to comply with the MUTCD, the portions of the MUTCD that plaintiff suggests were violated did not create specific duties sufficient to be the basis for a claim of negligence *per se*.

In the version of the MUTCD applicable here, the information regarding use of traffic control devices is categorized into “Standards,” “Guidance,” “Option,” or “Support.” MUTCD § 1A.13. While a “Standard” is “a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device” for which “[t]he verb ‘shall’ is typically used[,]” “Guidance” is “a statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate” for which “[t]he verb ‘should’ is typically used.” *Id.*

Chapter 6 of the MUTCD provides information for setting up temporary traffic control (“TTC”) activities. *Id.* at § 6A.01. TTC activities include “tapering” – diverting traffic from or back into its normal path – to shield workers in mobile work zones from approaching drivers. *Id.* at § 6C.08. An example of tapering is shifting traffic one lane over from its normal route. Part H of Chapter 6 contains “typical applications for a

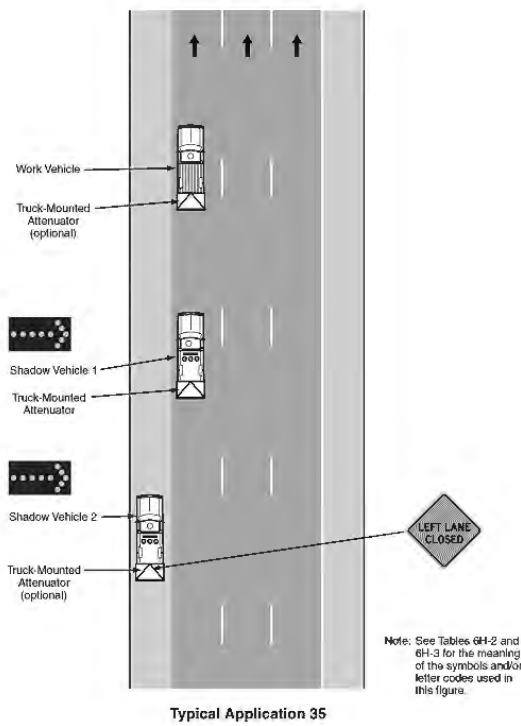
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variety of situations commonly encountered.” *Id.* at § 6H.01. “Except for the notes (which are clearly classified using headings as being Standard, Guidance, Option, or Support), the information presented in the typical applications can generally be regarded as Guidance.” *Id.*

Plaintiff contends that the typical application depicted in Figure 6H-35 in the MUTCD, reproduced below, required Mr. Marshall’s truck to be completely on the left shoulder, as portrayed by “Shadow Vehicle 2.” The undisputed evidence is that Mr. Marshall was not traveling completely on the left shoulder, and Mr. Marceau testified that this was “a violation of the MUTCD.”

Figure 6H-35. Mobile Operation on Multi-lane Road (TA-35)



Plaintiff also contends that Mr. Marshall violated the MUTCD by failing to maintain a proper tapering length – the distance given

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approaching drivers to adjust to a diverted traffic pattern – as provided by Table 6H-4. Mr. Marceau testified that according to Table 6H-4, which Figure 6H-35 uses to determine tapering lengths, MUTCD § 6H.01, Mr. Marshall's truck should have been traveling 660 feet behind the front attenuator truck. However, the undisputed evidence is that the tapering length was only 150 feet.

Other jurisdictions have recognized that the MUTCD's non-mandatory provisions do not provide specific duties the violation of which constitute negligence per se. For example, in *Esterbrook v. State*, 124 Idaho 680, 682, 683, 863 P.2d 349, 351, 352 (1993), the Idaho Supreme Court held that noncompliance with non-mandatory provisions of the MUTCD could not be the basis for a determination of negligence per se because non-mandatory provisions of the MUTCD were "optional provisions" and did not "clearly define the required standard of conduct." That same Court later held in *Lawton v. City of Pocatello*, 126 Idaho 454, 461, 886 P.2d 330, 337 (1994), that certain provisions in the MUTCD are non-mandatory provisions since the MUTCD describes them as "recommended but not mandatory" and as "advisory condition[s]." As non-mandatory provisions, "they did not define any required standard of conduct." *Id.* at 462, 886 P.2d at 338.

We find the reasoning of *Esterbrook* and *Lawton* persuasive. Because non-mandatory provisions of the MUTCD are optional, they do not provide a duty to be obeyed and, therefore, while noncompliance with non-mandatory provisions may be relevant to a claim of negligence, such noncompliance does not constitute negligence per se.

Although Mr. Marceau testified that Mr. Marshall's truck not being completely on the shoulder was "a violation of the MUTCD," there is no indication in Figure 6H-35 or its notes or Table 6H-4 that they provide anything more than "Guidance" for the location of Mr. Marshall's truck or the taper length. Therefore, assuming that Mr. Marshall's truck location and the taper length did not comply with Figure 6H-35 or Table 6H-4, that evidence is not sufficient to support a claim of negligence per se. Because plaintiff has failed to point to any evidence that defendant violated mandatory provisions of the MUTCD, we conclude that the trial court did not err in denying plaintiff's request for a negligence per se instruction or in denying his motions for directed verdict, JNOV, and new trial on the basis of negligence per se.

NO ERROR.

Judges BRYANT and CALABRIA concur.

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CHARLES DANIEL ROBBINS, PLAINTIFF

v.

KAREN THOMAS ROBBINS, DEFENDANT

No. COA14-742

Filed 7 April 2015

1. Divorce—equitable distribution—insurance proceeds after tornado—not marital properly

In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, the trial court erred by concluding that the proceeds were marital property that should be divided by the court. The parties' homeowner's insurance policy lapsed subsequent to their separation, and defendant took out a new homeowner's insurance policy on the marital residence in her sole name. Because the premiums on the policy were paid with defendant's assets, the proceeds from the homeowner's insurance policy were the separate property of defendant.

2. Divorce—equitable distribution—insurance proceeds after tornado—defendant's accounting—truthfulness

In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, the trial court's findings concerning defendant's truthfulness in her accounting for the proceeds both were and were not supported by the evidence. Her testimony supported the first finding regarding a payment to a particular individual, but there was no competent evidence in the record that defendant paid money from the insurance proceeds to four individuals who were not listed in her accounting to the court.

3. Divorce—equitable distribution—insurance proceeds after tornado—amounts paid for materials

In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, there was competent record evidence to support the trial court's findings regarding amounts paid by defendant for materials.

4. Divorce—equitable distribution—insurance proceeds after tornado—value of marital home

In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after

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a tornado, there was competent evidence in the record to support some portions of the trial court's finding regarding the marital property, although the trial court on remand may reconsider its conclusions based upon this finding in light of the fact that the insurance proceeds were defendant's separate property. One particularly salient portion of this finding was not supported by the evidence: there was no evidence regarding the current value of the marital home. The sole appraisal in evidence addressed *only* the date of separation value of the home, and based on both the appraisal and the plaintiff's own testimony, the home was in dilapidated condition even then.

5. Divorce—equitable distribution—insurance proceeds after tornado—kind of repairs performed—separate property

In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, a finding of fact that that the only structural repairs defendant made to the marital residence consisted of repairing certain floors and patching the roof was supported by competent record evidence. On remand, the trial court should consider these repairs as defendant's use of her separate property to make repairs to the marital home and not as a misappropriation of marital funds.

6. Divorce—equitable distribution—insurance proceeds after tornado—findings—partial replacement of roof

In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, the trial court's finding that defendant made the unilateral decision not to replace the entire roof of the structure, which was the primary purpose of the insurance proceeds, was supported by the testimony of defendant herself.

7. Divorce—equitable distribution—insurance proceeds after tornado—unequal distribution

In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, remanded on another issue, defendant argued that the trial court erred in making an unequal distribution in favor of plaintiff, but the insurance proceeds were defendant's separate property which was not subject to interim distribution or equitable distribution by the trial court. On remand the trial court must reconsider the distributional factors in light of the fact that the insurance proceeds were defendant's separate property.

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8. Divorce—equitable distribution—insurance proceeds after tornado—failure to provide accounting

In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, an unequal distribution in favor of plaintiff was reversed where the trial court put substantial weight on the defendant's failure to provide an accounting for the insurance proceeds and on the neglect of the marital residence. The findings were based on the erroneous classification of the insurance proceeds as marital property when they were actually defendant's separate property. On remand, the trial court was instructed to make findings of fact upon all of the distributional factors upon which evidence was presented and reconsider the distributional factors.

9. Divorce—equitable distribution—insurance proceeds after tornado—considerations on remand

In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, the trial court was instructed on remand to reconsider the entire distribution scheme, with a new date of distribution and, if requested by either party, consider additional evidence and arguments regarding changes in the condition or value of the marital home as well as distributional factors since the date of the last trial. However, the parties should not be permitted a "second bite at the apple" with new evidence or arguments as to the classification or valuation of marital or divisible property or debts up to the final day of the equitable distribution trial.

Appeal by defendant from order entered 8 January 2014 by Judge Tim Finan in Greene County District Court. Heard in the Court of Appeals 18 November 2014.

Garrens, Foster & Sargeant, P.A., by Jonathon L. Sargeant, for plaintiff.

W. Gregory Duke for defendant.

McCULLOUGH, Judge.

Defendant appeals from an equitable distribution order entered 8 January 2014. Based on the reasons stated herein, we affirm in part, and reverse and remand in part, the order of the trial court.

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I. Background

On 31 May 2011, plaintiff Charles Daniel Robbins filed a complaint against defendant Karen Thomas Robbins for equitable distribution and interim equitable distribution. Plaintiff and defendant were married on 1 June 1987 and separated on or about 5 February 2011. Plaintiff argued that it would be equitable for plaintiff to receive more than fifty percent of the marital property. Plaintiff alleged that after the parties' separation, the parties' marital residence had been damaged by recent storms in Greene County. Plaintiff further alleged that defendant had filed claims with the parties' insurance carrier for said damage and "is not using said insurance proceeds to repair the marital property of the parties and is spending said funds for her personal gain." Plaintiff argued that the trial court should require defendant to provide an accounting for insurance proceeds received and spent by plaintiff.

On 8 August 2011, defendant filed an answer and counterclaims for post-separation support and alimony, equitable distribution, and attorneys' fees.

Following a hearing held on 5 July 2011, the trial court entered an order for interim equitable distribution on 6 September 2011. The trial court found that defendant was in sole possession of the marital residence, that storms had damaged the marital residence, and that defendant had filed claims with the insurance carrier for the damages. Based upon the foregoing, the trial court ordered the following:

1. That within sixty (60) days from today, July 5, 2011, the defendant, Karen Thomas Robbins, shall provide a written accounting to counsel for plaintiff with documents showing the following:
 - a. All insurance claims of any kind made with regard to the marital residence or any personal property of either party from January 1, 2011 to the present;
 - b. All insurance proceeds received by the defendant, including the amount and date received;
 - c. All insurance proceeds dispersed [sic] or spent for any reason prior to July 5, 2011 including a specific list of items or services purchased; and
 - d. The current balance of all insurance proceeds which are being held by the defendant pursuant to this order.

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2. That effective July 5, 2011, the defendant, Karen Thomas Robbins, be and the same is hereby restrained and enjoined from trading, spending or otherwise transferring any insurance proceeds in her possession or control until further order of the Court.

On 13 August 2012, plaintiff filed a motion for contempt against defendant arguing that although defendant had the ability to comply with the 6 September 2011 order for interim equitable distribution, she had wrongfully, willfully, and intentionally failed and refused to do so. Plaintiff asserted that:

- a. The defendant failed to produce any documents or records by the court ordered deadline of September 3, 2011;
- b. On or about February 14, 2012, the defendant produced several documents to counsel for plaintiff which included statements handwritten by various persons which were dated in November of 2011. Said documents failed to comply with the Order of the Court in that the documents:
 1. Did not include any documents showing the amount of insurance proceeds received;
 2. Did not include the dates insurance proceeds were received;
 3. Did not include the dates any insurance proceeds were dispersed [sic];
 4. Did not include any detailed itemization of the items or services purchased with the insurance money; and
 5. Did not include any contact information which would allow counsel for plaintiff to verify any of the information provided.
- c. In open court on June 12, 2012, the defendant produced an additional insurance document.

Plaintiff also prayed that the court order defendant to pay plaintiff's attorneys' fees.

On 7 September 2012, the trial court entered a civil contempt order against defendant. The trial court found that defendant had failed to produce any documents or records by the court ordered deadline of

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3 September 2011 and that the information produced by defendant was incomplete, late, and not in compliance with the trial court's 6 September 2011 order. The trial court also found that defendant suffered from severe anxiety, clinical depression, multiple seizures, and short-term memory loss. After considering defendant's medical condition and current medications, the trial court concluded that defendant should be given a means to purge herself of contempt and ordered that she could purge herself by fully complying with the 6 September 2011 order on or before 14 September 2012 by filing the required information with the Clerk of Court of Greene County and serving a copy on plaintiff's counsel; coming to the office of the Clerk of Court of Greene County on 7 September 2012 to be served with the civil contempt order by acceptance or by a sheriff's deputy; and, paying plaintiff's attorneys' fees in the amount of \$1,25.00 by 1 December 2012.

Following hearings held during the 9 January 2013 and 6 February 2013 terms of Greene County District Civil Court, the trial court entered an equitable distribution order on 25 February 2013. The trial court noted that although defendant was present at the 9 January 2013 hearing, she was not present and not represented by counsel at the 6 February 2013 hearing. Nevertheless, the trial court completed the equitable distribution hearing and found that an equal distribution of the net marital estate was not equitable in the parties' case based on defendant's neglect of the marital residence. Plaintiff was awarded more than one-half of the net marital estate. The marital residence was awarded to plaintiff and defendant was ordered to vacate the marital residence within thirty days of the filing of the order.

On 8 March 2013, defendant filed a motion for a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. Defendant argued that she missed the 6 February 2013 equitable distribution hearing based on a medical illness.

On 8 May 2013, the trial court entered an order setting aside the 25 February 2013 equitable distribution order and allowing defendant an opportunity to complete the presentation of her evidence. The equitable distribution hearing was completed on 18 November 2013.

On 8 January 2014, the trial court entered an equitable distribution order making the following pertinent findings of fact:

15. Following the parties' separation, the house was damaged by a tornado on April 16, 2011. Homeowners insurance was in effect on April 16, 2011, paid for by the defendant, when a tornado damaged the marital residence

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of the parties. This insurance coverage was paid for by the Defendant and the proceeds checks were made payable to the Defendant. As a result of the tornado, the homeowners' insurance company, Nationwide Insurance Company, paid the Defendant several claim installments which totaled \$16,572.00.

....

17. With regard to the Insurance Proceeds, the court finds that said insurance proceeds were paid for damages to a marital asset that being the marital residence located at 571 Central Drive in Snow Hill, North Carolina. The parties purchased and owned this asset jointly during the marriage, and both parties have an equitable interest in the insurance proceeds from the damage to this asset. As such, the court finds that the Insurance Proceeds received by the defendant for the damages to the marital residence are classified as marital property and should be divided by the court in Equitable Distribution.

....

19. In her testimony to this court on November 18, 2013 and November 19, 2013, the defendant admitted under oath that she had violated the July 5, 2011 Order of the Court as follows:

- a. The defendant was not truthful in her previous accounting to the court in that the defendant paid \$900.00 to Henry Manning from the insurance proceeds which was not listed in her accounting to the court;
- b. The defendant was not truthful in her previous accounting to the court in that the defendant paid money from the insurance proceeds to four (4) other individuals who were not listed in her accounting to the court;
- c. The defendant was not truthful in her previous accounting to the court in that the defendant calculated the total cost of materials which were allegedly purchased with the insurance proceeds by simply deducting the cost of labor from the total amount of the insurance proceeds and assuming that the remaining amount was spent entirely for materials;

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d. The defendant spent and dispersed [sic] insurance proceeds after July 5, 2011 when she was under the Order of this court not to spend or disperse [sic] insurance proceeds. The defendant presented multiple receipts for materials into evidence which are dated after July 5, 2011, and the defendant specifically testified that she paid multiple individuals for labor and repairs to the marital residence with insurance money after July 5, 2011 and without the permission of the court.

....

21. The failure of the defendant to comply with the July 5, 2011 Order of the Court has created an [sic] number of problems for the court in attempting to determine which repairs to the marital residence were made with the insurance proceeds. In addition, due to the defendant's failure to comply with the July 5, 2011 court order, the plaintiff was not involved in any decision making with regard to the repairs to the marital residence and the Court finds that the decisions of the defendant as to what repairs to make to the marital residence have had a substantial impact on the date of separation and current value of the property.

....

23. Mr. Outlaw [(qualified appraiser)] visited the property on April 3, 2012 and found the property to be in need of a roof replacement, floor covering, drywall repair, as well as subfloor and ceiling repair from water damage.

24. All these issues were observed by Mr. Outlaw on April 3, 2012 after the defendant had supposedly already used the insurance proceeds to make repairs to the residence.

....

28. With regard to the marital residence located at 571 Central Drive in Snow Hill, North Carolina, the Court finds that while the defendant has made cosmetic repairs to the marital residence – new Pergo flooring, painting walls and ceilings, new carpet, new bathtub, new toilet and changing locks, the only structural repairs to the property were made to repair certain floors and only to patch, and not replace, a hole in the roof.

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29. The defendant made the unilateral decision not to replace the entire roof of the structure which was the primary purpose of the insurance proceeds.

30. The decisions of the defendant as to what repairs to make to the property were further complicated by the defendant's total and complete lack of maintaining any records of the work conducted and the fact that the defendant extensively co-mingled the insurance proceeds with her personal funds.

31. Even after the court's order of July 5, 2011, the defendant continued to pay all expenses in cash and maintained no records to be reviewed by the Court.

....

37. In determining whether an equal division by using the net value of all marital property would be equitable in this case, the plaintiff presented several factors which the Court finds to be as follows:

a. Under section 50-20(c)(9), the liquid or non-liquid character of the marital estate, the Court finds that the major asset in this matter, the marital residence is non-liquid in nature and due to its present condition can not be sold or liquidated without substantial work and improvements;

b. Under section 50-20(c)(11a), acts of either party to maintain or preserve marital property, the Court finds that the plaintiff paid marital debts to Spring Leaf Financial, North Carolina Department of Revenue and Greene County Property Taxes which preserved the marital residence during the period of separation.

c. Under section 50-20(c)(11a), acts of either party to waste, neglect or devalue marital property, the Court finds that the defendant failed to provide a complete and detailed accounting for all insurance proceeds received on the marital residence as ordered by the Court multiple times, and during the separation of the parties the defendant failed to properly maintain and repair the marital residence of the parties at 571 Central Drive in Snow Hill, North Carolina such that

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the value of the marital residence has decreased substantially from the date of separation to the date of trial. The Court finds that the defendant has not provided sufficient evidence to find that the insurance proceeds issued for storm damage to the marital residence were actually spent on the marital residence. The defendant has neglected the maintenance of the marital residence during the period of separation to the detriment of the plaintiff and the marital estate. . . .

38. In considering the distributional factors set forth above, the Court puts substantial weight on the defendant's failure to provide an accounting for the insurance proceeds and on the neglect of the marital residence and finds that an equal distribution of the net marital estate is not equitable in this case, and that it would be equitable for the plaintiff to receive more than one-half of the net marital estate.

In making an unequal distribution, the trial court awarded plaintiff, among other things, the marital residence. Defendant appeals.

II. Standard of Review

[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*.

Lee v. Lee, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004) (citations omitted). "Our review of an equitable distribution order is limited to determining whether the trial court abused its discretion in distributing the parties' marital property. Accordingly, the findings of fact are conclusive if they are supported by any competent evidence from the record." *Robinson v. Robinson*, 210 N.C. App. 319, 322, 707 S.E.2d 785, 789 (2011) (citations and quotation marks omitted).

III. Discussion

On appeal, defendant argues that the trial court erred by (A) entering findings of fact numbers 17, 19, 21, 28, and 29; (B) making an unequal distribution of the parties' marital property, marital debt, and divisible

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property in favor of plaintiff; and, (C) distributing the marital residence to plaintiff.

A. Findings of Fact**1. Classification of Insurance Proceeds**

[1] In her first issue on appeal, defendant argues that the trial court erred by entering findings of fact numbers 17, 19, 21, 28, and 29, where there was no competent evidence in the record to support these findings.

Finding of fact number 17 provides as follows:

With regard to the Insurance Proceeds, the court finds that said insurance proceeds were paid for damages to a marital asset that being the marital residence located at 571 Central Drive in Snow Hill, North Carolina. The parties purchased and owned this asset jointly during the marriage, and both parties have an equitable interest in the insurance proceeds from the damage to this asset. As such, the court finds that the Insurance Proceeds received by the defendant for the damages to the marital residence are classified as marital property and should be divided by the court in Equitable Distribution.

In conducting an equitable distribution hearing, the trial court goes through a three-step process: “(1) to determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner.” *Dalgewicz v. Dalgewicz*, 167 N.C. App. 412, 421, 606 S.E.2d 164, 170 (2004) (citation omitted). “Because the classification of property in an equitable distribution proceeding requires the application of legal principles, this determination is most appropriately considered a conclusion of law.” *Hunt v. Hunt*, 112 N.C. App. 722, 729, 436 S.E.2d 856, 861 (1993).

N.C. Gen. Stat. § 50-20 defines “marital property” as

all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection.

N.C. Gen. Stat. § 50-20(b)(1) (2014). “Separate property” is defined as “all real and personal property acquired by a spouse before marriage or

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acquired by a spouse by devise, descent, or gift during the course of the marriage.” N.C. Gen. Stat. § 50-20(b)(2) (2014). Our Courts have stated that “[v]esting is crucial in distinguishing between marital and separate property under N.C.G.S. §§ 50-20(b)(1) and (2).” *Boger v. Boger*, 103 N.C. App. 340, 344, 405 S.E.2d 591, 593 (1991).

Plaintiff relies on our holdings in *Locklear v. Locklear*, 92 N.C. App. 299, 374 S.E.2d 406 (1988), and *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986), for his contention that the trial court was correct in its determination that the homeowner’s insurance proceeds received by defendant qualify as marital property.

In *Locklear*, the parties moved into a house owned by the husband’s parents after they married. The parties did not sign a lease nor did they pay rent. Nonetheless, the parties made substantial improvements to the home while they lived there. All improvements were made prior to separation, using marital funds. *Locklear*, 92 N.C. App. at 302-303, 374 S.E.2d at 408. Two homeowners’ insurance policies covered the house and improvements. After the parties separated, a fire completely destroyed the house. *Id.* at 303, 374 S.E.2d at 408. The issue before our Court was whether the trial court properly classified the portion of the insurance proceeds, representing the home improvements, as marital property. *Id.* The husband argued that since his mother was the owner of the house, the insurance belonged solely to her and could not be classified as marital property. Our Court disagreed. *Id.* at 304, 374 S.E.2d at 409. Our Court noted that the parties had expended marital funds in making the home improvements, and that each time the parties improved the property, the marital estate was depleted. Therefore, the insurance proceeds represented “an economic loss to the marital estate – the value of the improvements made to the marital residence.” *Id.* Our Court held that the home improvements were an asset acquired by the parties during their marriage and that the wife was entitled to her equitable share of that asset. *Id.* at 305, 374 S.E.2d at 409.

In *Johnson*, the husband was involved in a serious motorcycle accident during the parties’ marriage. *Johnson*, 317 N.C. at 440, 346 S.E.2d at 432. After the parties separated, the husband received a settlement for his personal injury claim in the amount of \$95,000. *Id.* The trial court concluded that the settlement was the husband’s separate property and the wife appealed. *Id.* Our Court adopted the “analytic” approach to the resolution of this case, which “asks what the award was intended to replace.” *Id.* at 446, 346 S.E.2d at 435.

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Those courts which employ the analytic approach consistently hold that the portion of an award representing compensation for non-economic loss – i.e. personal suffering and disability – is the separate property of the injured spouse; the portion of an award representing compensation for economic loss – i.e. lost wages, loss of earning capacity during the marriage, and medical and hospital expenses paid out of marital funds – is marital property.

Id. at 447-48, 346 S.E.2d at 436. Our Court held that because the record was devoid of any evidence as to what elements of recovery were represented by the \$95,000 settlement, we remanded the matter to the trial court for further proceedings in order to determine what components were represented by the settlement. *Id.* at 453, 346 S.E.2d at 439.

After thoughtful review, we find the facts of the present case distinguishable from the circumstances found in both *Locklear* and *Johnson*. The *Locklear* case dealt with equitable distribution of active appreciation of non-owned real property during the parties' marriage, while in the case *sub judice*, we are dealing with insurance proceeds representing damage to the parties' marital asset, their marital residence. Unlike in *Locklear*, the parties' homeowner's insurance policy of the present case ended after the date of separation. Thereafter, defendant procured a new homeowner's insurance policy on the marital residence in her sole name and with her separate funds. In regards to the *Johnson* case, the husband's motorcycle accident occurred during the parties' marriage while the tornado that occurred in the present case took place after the parties had separated.

Rather, we find our holding in *Foster v. Foster*, 90 N.C. App. 265, 368 S.E.2d 26 (1988), to be instructive. In *Foster*, the parties had two children during the marriage. The husband purchased insurance policies on the life of each child and paid the premiums on the policies from his earnings. After the parties separated, their son died and \$20,000 in proceeds from the insurance policy were paid and held in a trust account. The trial court held that the \$20,000 in death benefits were the separate property of the husband and the wife appealed. Our Court noted that pursuant to N.C. Gen. Stat. § 50-20(b)(1), "in order for property to be considered marital property it must be 'acquired' before the date of separation and must be 'owned' at the date of separation." *Id.* at 267, 368 S.E.2d at 27.

[A]t the time of [the parties'] separation there were no vested rights under the insurance policy on the life of [the parties' son]. The rights only vested at the death

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of [the parties' son], and until then plaintiff, as owner of the policy, could have cancelled the policy or changed the beneficiary. At the time of separation, the cash value of the insurance policies was marital property since the premiums to that point had been paid for with marital assets. The premiums after separation were paid for with For more, see page 14 plaintiff's assets, and therefore the proceeds from the insurance policy were separate property of plaintiff.

Id. at 268, 368 S.E.2d at 28.

Similarly, in the present case, there were no vested rights under the homeowner's insurance policy on the marital residence. The parties' homeowner's insurance policy lapsed subsequent to their separation. Defendant took out a new homeowner's insurance policy on the marital residence in her sole name. It was only after separation that the rights under the homeowner's insurance policy vested after a tornado damaged the marital residence. There was no evidence that defendant used marital funds to pay the insurance premiums. Because the premiums on the policy were paid with defendant's assets, the proceeds from the homeowner's insurance policy were the separate property of defendant. Based on the foregoing, we hold that the trial court erred by concluding that the insurance proceeds received by defendant for damage to the marital residence were marital property and concluding that it should be divided by the court in equitable distribution. Accordingly, we reverse and remand this case to the trial court with instructions to properly classify the proceeds of the homeowner's insurance on the marital residence as the separate property of defendant and to enter a new equitable distribution order reflecting this classification. We also note that the insurance proceeds were defendant's separate property which has now been invested in the marital residence which was distributed to plaintiff. The trial court must also consider on remand that if the marital home is ultimately distributed to plaintiff, he must also be required to reimburse defendant for this separate property.

Although we remand to the trial court to enter a new equitable distribution order, we also address defendant's other issues which are relevant to the trial court's consideration on remand.

2. Use of Insurance Proceeds

[2] Next, defendant argues that there was no competent evidence in the record to support finding of fact number 19, which provides as follows:

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19. In her testimony to this court on November 18, 2013 and November 19, 2013, the defendant admitted under oath that she had violated the July 5, 2011 Order of the Court as follows:

- a. The defendant was not truthful in her previous accounting to the court in that the defendant paid \$900.00 to Henry Manning from the insurance proceeds which was not listed in her accounting to the court;
- b. The defendant was not truthful in her previous accounting to the court in that the defendant paid money from the insurance proceeds to four (4) other individuals who were not listed in her accounting to the court;
- c. The defendant was not truthful in her previous accounting to the court in that the defendant calculated the total cost of materials which were allegedly purchased with the insurance proceeds by simply deducting the cost of labor from the total amount of the insurance proceeds and assuming that the remaining amount was spent entirely for materials;
- d. The defendant spent and dispersed [sic] insurance proceeds after July 5, 2011 when she was under the Order of this court not to spend or disperse [sic] insurance proceeds. The defendant presented multiple receipts for materials into evidence which are dated after July 5, 2011, and the defendant specifically testified that she paid multiple individuals for labor and repairs to the marital residence with insurance money after July 5, 2011 and without the permission of the court.

In regards to subsection (a) and (b) of finding of fact number 19, on 14 February 2012, defendant submitted an accounting to the trial court of how and to whom the homeowner's insurance proceeds were paid. At trial, however, defendant testified that she paid several individuals that were not listed in her accounting to the court. Defendant testified that she paid Henry Manning \$900.00 and paid "Cecil" \$125.00. Further, defendant testified that she paid "Jason," who was listed in her accounting, an "extra \$150[.00]." Based on the foregoing, we hold that subsection (a) was supported by competent evidence, while subsection (b) was not. There was no competent evidence in the record that defendant paid

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money from the insurance proceeds to four individuals who were not listed in her accounting to the court.

[3] Concerning subsection (c), we find competent record evidence to support the trial court's finding. Defendant testified to the following:

Q. And you listed on your accounting for insurance proceeds \$2,726 worth of materials?

A. That's I believe about -- I mean I didn't keep up with it. My main thing was to get that house livable.

Q. Well, how did you come up with that figure \$2,726?

A. Because of what I had to give -- what I had give [sic] Henry roughly. It was a rough estimate.

....

Q. Isn't it true, ma'am, that when you did this, you added up the numbers of what you paid these other people and then you just subtracted that from the total and put down the difference as what you must have spent on materials?

A. Yeah, probably.

In regards to subsection (d), defendant admitted paying multiple individuals after the 5 July 2011 Order by the trial court. Defendant also submitted multiple receipts for materials in defendant's exhibit number 30 which are dated after 5 July 2011. Thus, we find subsection (d) to be supported by competent evidence.

[4] Next, defendant challenges finding of fact number 21, which provides as follows:

21. The failure of the defendant to comply with the July 5, 2011 Order of the Court has created an [sic] number of problems for the court in attempting to determine which repairs to the marital residence were made with the insurance proceeds. In addition, due to the defendant's failure to comply with the July 5, 2011 court order, the plaintiff was not involved in any decision making with regard to the repairs to the marital residence and the Court finds that the decisions of the defendant as to what repairs to make to the marital residence have had a substantial impact on the date of separation and current value of the property.

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There is competent evidence in the record to support some portions of this finding, although the trial court on remand may reconsider its conclusions based upon this finding in light of the fact that the insurance proceeds were defendant's separate property. All of the conclusions of the order on appeal were premised upon the mistaken determination that the insurance proceeds were marital property, when in fact they were defendant's separate property. For example, the trial court might consider defendant's failure to consult plaintiff regarding repair decisions differently, despite the interim distribution order, since she was both residing in the home and spending her separate funds on the repairs.

It is true that at least some of the evidence in the record reveals that the insurance company paid the defendant's insurance claim primarily to repair the damage to the roof and exterior of the house. Instead, defendant testified that she "used the money to try to fix things like the hot water heater, the rotten floors." Defendant also testified as follows:

Q. So, the bottom line here is they paid you to replace the roof but you chose to use it for other items, isn't that right?
Interior items that were not covered by the insurance.

A. Yes, because I was scared if they walked in the door, that it would be -- they would condemn the home. And the roof was fixed at that point and then the money was used to fix the other items.

Q. The insurance company didn't give you any money to replace your rotten floors, did they?

A. No, but they gave me the check and I chose to use it in the best manner that I knew how and in the best manner for [sic] to save the home.

Q. And the insurance company didn't pay you to replace your hot water heater, did they?

A. No, they didn't.

Both defendant and plaintiff testified that defendant did not consult with plaintiff on how to spend the insurance proceeds.

But one particularly salient portion of this finding is not supported by the evidence because there was no evidence regarding the current value of the marital home. Specifically, the trial court found that defendant's actions had a "substantial impact on the date of separation and current value of the property." Yet the sole appraisal in evidence addressed *only* the date of separation value of the home, and based on

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both the appraisal and the plaintiff's own testimony, the home was in dilapidated condition even then. For example, plaintiff admitted that when he moved out of the home, there was already substantial water damage to several areas of the floor in several rooms; the refrigerator had been moved because of water damage to the floor under the refrigerator; the HVAC was not working; the carpet was in bad shape; and that the hot water heater had been nonoperational for about a year before he left. In fact, he admitted that they had to boil water on the stove to get hot water for a bath. He also testified that he had removed the toilet from the master bathroom about a year before he left because it overflowed and "completely soaked" the floors in the bedroom and bathroom with over an inch of water. He did not ever replace the master bath toilet. He had not repaired these things when he was living there because he had been unemployed for about two years before he left. The appraiser never saw the home until 3 April 2012, about a year after the date of separation, and based his appraisal upon the condition of the home as reported to him, and he noted that the home was in poor condition even before the storm damage.

Mr. Herbert Outlaw, an appraiser, inspected the marital residence on 3 April 2012. Mr. Outlaw concluded in his appraisal report that

The subject is in poor condition and in need of repair in order to be habitable or marketable. . . . These needed repairs include: roof repair or replacement, floor covering, drywall repair, interior painting, hvac system replacement, subfloor and ceiling repair from water damage, replacement of fixtures, vinyl repair, etc. This list is meant to provide an example of needed repairs, not to be an exhaustive list. . . . Given the condition of the property, there are two feasible methods to estimate value. First, one could locate properties that were in a similar condition. This might include foreclosure properties, which would be in disrepair. . . . The other is to take similar properties in repaired condition, deduct the cost of repair and the expected profit of the investor.

. . . .

These methods combined show an adjusted value range from approximately \$49,000 to 70,000.

Based upon the trial court's findings, it appears that the court found that the value of the house was the same on the date of separation as on the date of distribution, but that it might have been increased if

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defendant had used the insurance proceeds in a different way. Actually, there was no evidence of the value of the home on any date other than the date of separation. The trial court also made “conclusions of law” regarding the value of the marital home as follows:

8. The Court finds that Mr. Outlaw’s appraised fair market value of \$60,000 as of the date of separation is fair and accurate in this matter.

9. These decisions by the defendant resulted in the marital residence having numerous cosmetic changes which have not substantially *increased* the value of the property.

....

12. The defendant by her own intentional or grossly negligent actions has made it impossible for the court to review and determine whether the insurance proceeds were, in fact, used to improve the marital home and whether the improvements themselves ever *added* any value to the marital home.

(emphasis added).

The trial court specifically did not find any actual diminution in value, nor was there evidence of a decreased value of the home after the date of separation or as of the date of trial. Apparently, the trial court assumed that the house could have increased in value after the date of separation if defendant had made different repairs to the home, but there was no evidence and no findings of fact as to how particular repairs would have changed the value of the property. In any event, it is undisputed that the home was not in marketable, and barely livable, condition as of the date of separation, even considering only the lack of operational heating or air conditioning, a water heater, and a missing toilet in the master bathroom. Nor was there any evidence of the value of the home on any date except the date of separation.

Based on the abovementioned evidence, we reverse the final portion of the trial court’s finding of fact number 21 which states that “and the Court finds that the decisions of the defendant as to what repairs to make to the marital residence have had a substantial impact on the date of separation and current value of the property.” The rest of finding of fact number 21 is supported by the record, although the relevance of the finding may be questionable.

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[5] Defendant also challenges finding of fact number 28, which states the following:

28. With regard to the marital residence located at 571 Central Drive in Snow Hill, North Carolina, the Court finds that while the defendant has made cosmetic repairs to the marital residence – new Pergo flooring, painting walls and ceilings, new carpet, new bathtub, new toilet and changing locks, the only structural repairs to the property were made to repair certain floors and only to patch, and not replace, a hole in the roof.

We find that this finding of fact is supported by competent record evidence. First, the record demonstrates that defendant made the following cosmetic repairs to the residence: yard clean up; carpet removal and replacement; Pergo flooring for the dining room and hallway; painting walls and ceilings; replacing the toilet; replacing the bathtub; changing locks. In addition, defendant testified at trial that she used the insurance proceeds to fix the “rotten floors.” Defendant did not replace the roof, but repaired the roof by getting new shingles in the places where a tree broke through the roof of the marital residence. Thus, we uphold the trial court’s finding that the only structural repairs defendant made to the marital residence consisted of repairing certain floors and patching the roof. But again, on remand, the trial court should consider these repairs as defendant’s use of her separate property to make repairs to the marital home and not as a misappropriation of marital funds.

[6] Lastly, defendant challenges finding of fact number 29 which provides that “defendant made the unilateral decision not to replace the entire roof of the structure which was the primary purpose of the insurance proceeds.” This finding of fact is supported by the testimony of defendant herself. Defendant testified that although the purpose of the insurance proceeds was to replace the roof, she made the decision to use the proceeds for other purposes without consulting with plaintiff.

In conclusion, while we affirm portions of the trial court’s findings of fact numbers 19(a), (c), (d) and 21, 28, and 29, we find no competent evidence in the record to support finding of fact 19(b). We also hold that the trial court erred by concluding, in finding of fact number 17, that the homeowner’s insurance proceeds were marital property, rather than the separate property of defendant, and dividing it in equitable distribution. Therefore, we reverse and remand this case to the trial court to enter a new equitable distribution order consistent with this opinion.

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B. Distributional Factors

[7] Defendant next argues that “the trial court erred in making an unequal distribution of the parties’ marital property, marital debt, and divisible property in favor of plaintiff.” Defendant contends that

the trial court’s basis for making an unequal distribution, in essence, boils down to its findings that Defendant didn’t properly spend, or account for, the insurance proceeds derived from the tornado which damaged the house in April of 2011, that Defendant neglected the residence, and that the residence was worth less on the date of the hearing than when the parties separated in February 2011.

As noted above, the trial court made a number of findings regarding the defendant’s failure to comply with the court’s 6 September 2011 order for interim distribution requiring defendant to account for her use of the insurance proceeds, which treated these proceeds as marital property, thus subject to interim distribution. Defendant has not appealed from the interim distribution order, nor from the later order holding her in contempt of that order, so we cannot review these on appeal, and they have no direct effect on the order of equitable distribution. However, the trial court made numerous findings of fact regarding defendant’s failure to account for her use of these funds and concluded that:

16. In considering the distributional factors set forth above, the Court puts *substantial weight* on the defendant’s failure to provide an accounting for the insurance proceeds and on the neglect of the marital residence and finds that an equal distribution of the net marital estate is not equitable in this case, and that it would be equitable for the plaintiff to receive more than one-half of the net marital estate.

(emphasis added).

But the insurance proceeds were defendant’s separate property which was not subject to interim distribution or equitable distribution by the trial court, so on remand the trial court must reconsider the distributional factors, in light of the fact that the insurance proceeds were defendant’s separate property. The fact that she did use the funds for repairs may actually be a distributional factor in her favor.

[8] Although the trial court considered several distributional factors, as discussed above, finding of fact number 38 notes that the trial court “put[] *substantial weight* on the defendant’s failure to provide an

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accounting for the insurance proceeds and on the neglect of the marital residence.” (emphasis added). We have already determined that this and related findings were based upon the erroneous classification of the insurance proceeds as marital property when it was actually defendant’s separate property. We must therefore reverse the unequal distribution in favor of plaintiff. We also note that

[t]he trial court must . . . make specific findings of fact regarding each factor specified in N.C. Gen. Stat. § 50–20(c) (2001) on which the parties offered evidence.” *Embler v. Embler*, 159 N.C. App. 186, 188, 582 S.E.2d 628, 630 (2003) (citing *Rosario v. Rosario*, 139 N.C. App. 258, 260–61, 533 S.E.2d 274, 275–76 (2000)). A blanket statement that the trial court considered or gave “due regard” to the distributional factors listed in N.C. Gen. Stat. § 50-20(c) is insufficient as a matter of law. *Rosario*, 139 N.C. App. at 262, 533 S.E.2d at 276.

Peltzer v. Peltzer, __ N.C. App __, __, 732 S.E.2d 357, 360 (2012).

Although the weight given to any factor is in the trial court’s discretion, it is apparent that the trial court did not make findings on all of the distributional factors upon which evidence was presented. One example is the evidence of defendant’s medical problems. In fact, in the contempt order, the trial court earlier found that defendant suffered from “severe anxiety, clinical depression, multiple seizures and short-term memory loss[,]” and evidence was presented about these issues at the equitable distribution trial also, but the trial court did not make any findings of fact regarding the distributional factor of the “physical and mental health of both parties.” N.C. Gen. Stat. § 50-20(c)(3). On remand, the trial court should make findings of fact upon all of the distributional factors upon which evidence was presented and shall reconsider the distributional factors in a manner consistent with this opinion.

C. Distribution of Marital Residence

[9] Defendant’s third argument is that the trial court erred in distributing the parties’ former marital residence to plaintiff. Based upon the disposition of issues (A) and (B), we need not discuss this in detail, as on remand the trial court must reconsider the entire distributional scheme. But since a new distribution order must be entered, there will be a new date of distribution. In addition, plaintiff has presumably been residing in the home based upon the trial court’s order, and the condition of the home may have changed. On remand the trial court shall, if requested by either party, consider additional evidence and arguments regarding

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changes in the condition or value of the marital home since the date of the last trial and distributional factors since the date of the last trial or evidence relevant to the issues to be considered on remand arising after the last trial. However, the parties should not be permitted a “second bite at the apple” by presenting new evidence or argument as to the classification or valuation of marital or divisible property or debts up to 19 November 2013, the final day of the equitable distribution trial; the trial court should rely on the existing record to make its findings and conclusions on remand consistent with this opinion except as to evidence arising after 19 November 2013.

Affirmed in part; reversed and remanded in part.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA
v.
MARQUICE ALEXANDER ANTONE

No. COA14-1011

Filed 7 April 2015

Sentencing—life imprisonment without parole—minor—first-degree murder—mitigating circumstances—findings

A sentence of life imprisonment without parole for a minor convicted of first –degree murder was remanded where the conviction was not based solely on felony murder and the trial court’s order made cursory, but adequate findings as to the mitigating circumstances set forth in N.C.G.S. § 15A-1340.19B(c)(1), (4), (5), and (6) but did not address factors (2), (3), (7), or (8). Factor (8), the likelihood of whether a defendant would benefit from rehabilitation in confinement, is a significant factor in the determination of whether the sentence of life imprisonment should be with or without parole. Also, portions of the trial court’s findings of fact were more recitations of testimony rather than evidentiary or ultimate findings of fact. Finally, if there is no evidence presented as to a particular mitigating factor, then the order should so state, and note that as a result, that factor was not considered.

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[240 N.C. App. 408 (2015)]

Appeal by defendant from judgment entered 25 March 2014 by Judge Gregory Bell in Columbus County Superior Court. Heard in the Court of Appeals 4 February 2015.

Roy Cooper, Attorney General, by Peter Regulski, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, and David W. Andrews, Assistant Appellate Defender, for defendant-appellant.

STEELMAN, Judge.

Where the trial court failed to follow the statutory mandate to make findings on the absence or presence of any mitigating factors before sentencing a minor convicted of first degree murder not based upon the theory of felony murder, that sentence is vacated and this case is remanded for resentencing.

I. Factual and Procedural Background

In April 2012, Marquice Antone (defendant) was 16 years old and a ninth grade student at East Columbus High School in Columbus County. On 12 April 2012, defendant, with Kenneth Williams and Terrance Hazel, went to the home of defendant's uncle, Keith Gachett, in Hallsboro, to steal guns, jewelry, and pills. When defendant, Williams, and Hazel arrived at the home, defendant and Williams entered, while Hazel remained in the car. Gachett and his wife were both initially present, but Gachett's wife subsequently left. Defendant persuaded Gachett to let him shoot some of Gachett's guns. After spending some time with Gachett, defendant, Williams, and Hazel left, and planned to return and break into the house the following day.

On 13 April 2012, defendant, Williams, and Hazel returned to Gachett's house. Gachett answered the door and admitted them. Defendant pulled out a revolver and accidentally fired it. Gachett insisted that defendant, Williams, and Hazel leave. Williams testified that as they were leaving he heard a second shot. He then saw that defendant was holding the revolver and that Gachett was on the floor. In a police interview, defendant stated that he was outside when Gachett was shot, and that when he went back inside, Hazel was holding the gun.

Defendant, Williams, and Hazel took three rifles and two handguns from the house; Hazel also took a pink bag containing pills and jewelry. They later abandoned the handguns and two of the rifles.

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Defendant was charged with robbery with a dangerous weapon and first degree murder. On 24 March 2014, a jury found defendant guilty of both offenses. The jury found defendant guilty of first degree murder based upon both felony murder and malice, premeditation and deliberation. Based upon the theory of malice, premeditation and deliberation, the trial court was required to decide whether defendant was to be sentenced to life imprisonment without parole, or life imprisonment with parole pursuant to Part 2A of Article 81B of Chapter 15A of the North Carolina General Statutes. The trial court entered an order and subsequently a judgment sentencing defendant to life imprisonment without parole. Judgment was arrested on the robbery with a dangerous weapon conviction.

Defendant appeals.

II. Sentence of Life Imprisonment Without Parole

In his first argument, defendant contends that the trial court erred by imposing a sentence of life imprisonment without the possibility of parole where it failed to identify any mitigating factors present in the case. We agree.

A. Standard of Review

“The standard of review for application of mitigating factors is an abuse of discretion.” *State v. Hull*, __ N.C. App. __, __, 762 S.E.2d 915, 920 (2014).

B. Analysis

When sentencing a minor who has been convicted of first degree murder that was not solely based on the theory of felony murder,

The court shall consider any mitigating factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole. The order adjudging the sentence shall include findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate to include in the order.

N.C. Gen. Stat. § 15A-1340.19C(a) (2013). This Court has held that “use of the language ‘shall’ is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error.” *In re Eades*,

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143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001) (citations omitted). Our Supreme Court has further held that mere recitations of evidence “cannot substitute for findings of fact resolving material conflicts.” *State v. Lang*, 309 N.C. 512, 520, 308 S.E.2d 317, 321 (1983).

The mitigating circumstances a defendant may submit to the trial court pursuant to N.C. Gen. Stat. § 15A-1340.19B(c) are:

- (1) Age at the time of the offense.
- (2) Immaturity.
- (3) Ability to appreciate the risks and consequences of the conduct.
- (4) Intellectual capacity.
- (5) Prior record.
- (6) Mental health.
- (7) Familial or peer pressure exerted upon the defendant.
- (8) Likelihood that the defendant would benefit from rehabilitation in confinement.
- (9) Any other mitigating factor or circumstance.

N.C. Gen. Stat. § 15A-1340.19B(c) (2013).

In the instant case, the trial court entered a one-page order containing the following findings of fact:

That at the time of the death of Keith Gachett, the defendant in this case had just turned 16 years old. That he was a ninth-grade student at East Columbus High School. That he was a good student, making As and Bs, and he participated in three sports at the high school. That his plans were to go to college and hopefully play sports. He attended church. That he had no prior record.

He lived with his mom. He was small in size. His father was in prison, and he didn’t meet his dad until he was about ten years old. That his parents thought he was easily led by others. That he was not a member of a gang but that one of his friends was a gang member, and that was one of the three that went into the Gachett house. That he didn’t have guns but his friends, at least one of the friends in this group, did have a gun. That he did play video games

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that involved guns. That he had started using marijuana when he was about age 15. That there were no mental health issues. That there was no question about his intellectual capacity. That he has shown today that he's shown remorse to the family of the deceased.

The Court finds there's insufficient mitigating factors to find life with parole, so the Court is giving the defendant life without parole. The order of my sentence is life without parole.

We hold that the trial court's findings of fact and order fail to comply with the mandate set forth in N.C. Gen. Stat. § 15A-1340.19C that requires the court to "include findings on the absence or presence of any mitigating factors[.]" The trial court's order makes cursory, but adequate findings as to the mitigating circumstances set forth in N.C. Gen. Stat. § 15A-1340.19B(c)(1), (4), (5), and (6). The order does not address factors (2), (3), (7), or (8). In the determination of whether the sentence of life imprisonment should be with or without parole, factor (8), the likelihood of whether a defendant would benefit from rehabilitation in confinement, is a significant factor.

We also note that portions of the findings of fact are more recitations of testimony, rather than evidentiary or ultimate findings of fact. The better practice is for the trial court to make evidentiary findings of fact that resolve any conflicts in the evidence, and then to make ultimate findings of fact that apply the evidentiary findings to the relevant mitigating factors as set forth in N.C. Gen. Stat. § 15A-1340.19B(c). *See Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951); *see also State v. Escobar*, 187 N.C. App. 267, 268, 652 S.E.2d 694, 696 (2007) (holding that "[a] trial court is not required to recite evidentiary facts in its findings of fact, but is required to make 'specific findings on the ultimate facts established by the evidence'"). If there is no evidence presented as to a particular mitigating factor, then the order should so state, and note that as a result, that factor was not considered.

We vacate the order and judgment of the trial court, and remand the case to the trial court for a new sentencing hearing on whether defendant should receive a sentence of life imprisonment without parole, or life imprisonment with parole.

III. Evidence

In his second argument, defendant contends that the trial court abused its discretion by imposing a sentence of life imprisonment

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without parole, where the evidence supported a sentence of life with the possibility of parole. Because we have vacated the trial court's order and judgment, we do not reach this argument.

VACATED AND REMANDED.

Judges DIETZ and INMAN concur.

STATE OF NORTH CAROLINA
v.
DELANDRE' BALDWIN, DEFENDANT

No. COA14-878

Filed 7 April 2015

1. Constitutional Law—double jeopardy—attempted first-degree murder—assault with a deadly weapon with intent to kill and inflicting serious injury

The trial court did not err by denying defendant's motion to require the State to elect the offense upon which it would proceed at trial. Under *State v. Tirado*, 358 N.C. 551 (2004), convictions for attempted first-degree murder and assault with a deadly weapon with the intent to kill and inflicting serious injury—offenses that arose from the same conduct—did not subject the defendant to double jeopardy.

2. Appeal and Error—Rule of Evidence 403 objection—different Rule 403 argument on appeal

Defendant preserved his Rule 403 objection to the admission of his recorded interview with police. While he made new arguments on appeal for why the evidence was inadmissible under Rule 403, his argument remained based on Rule 403.

3. Evidence—Rule of Evidence 403—recording of interview with police

The trial court did not err under Rule 403 by admitting a recording of defendant's interview with police after his arrest for shooting a man. The Court of Appeals rejected defendant's argument that the evidence had an undue tendency to suggest decision on an improper basis. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

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[240 N.C. App. 413 (2015)]

4. Homicide—attempted—jury instructions—imperfect self-defense—murderous intent

The trial court did not commit plain error by instructing the jury on attempted first-degree murder but failing to instruct on imperfect self-defense and attempted voluntary manslaughter. In light of the abundant evidence of defendant's murderous intent, defendant failed to show that, absent the alleged error, the jury probably would have acquitted him of the attempted first-degree murder charge.

5. Homicide—attempted—jury instructions—premeditation and deliberation—wounds inflicted after victim felled

The trial court did not err by instructing the jury that it could consider wounds inflicted after the victim was felled to determine whether defendant acted with premeditation and deliberation. The instructions at issue explained that the jury “may” find premeditation and deliberation from certain circumstances “such as” wounds inflicted after the victim was felled. There was no indication that the trial court believed the evidence supported the circumstances listed.

6. Appeal and Error—constitutional issue—raised for first time on appeal

Defendant failed to preserve the issue of whether the trial court violated his constitutional right to be free from double jeopardy when it sentenced him for both assault with a deadly weapon with the intent to kill and inflicting serious injury and assault inflicting serious bodily injury. Defendant did not raise the issue at trial, and a defendant may not raise a constitutional issue for the first time on appeal.

7. Constitutional Law—double jeopardy—assault with a deadly weapon with the intent to kill and inflicting serious injury—assault inflicting serious bodily injury

Exercising its discretionary power under Rule 2 of the Rules of Appellate Procedure, the Court of Appeals held that the trial court violated defendant's right to be free from double jeopardy by sentencing him for both assault with a deadly weapon with the intent to kill and inflicting serious injury (AWDWIKISI) and assault inflicting serious bodily injury (AISBI). N.C.G.S. § 14-32.4(a) states that a person may be convicted of AISBI “[u]nless the conduct is covered under some other provision of law providing greater punishment.” Defendant's AISBI conviction was vacated, and the case was remanded for resentencing on his AWDWIKISI conviction.

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[240 N.C. App. 413 (2015)]

Appeal by defendant from judgments entered 10 December 2013 by Judge Richard T. Brown in Superior Court, Hoke County. Heard in the Court of Appeals 6 January 2015.

Attorney General Roy A. Cooper III, by Assistant Attorney General Joseph L. Hyde, for the State.

Amanda S. Zimmer, for defendant-appellant.

STROUD, Judge.

Delandre' Baldwin ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of attempted first-degree murder, assault with a deadly weapon with the intent to kill and inflicting serious injury ("AWDWIKISI"), and assault inflicting serious bodily injury ("AISBI"). Defendant contends that the trial court erred in (1) denying his motion to require the State to elect the offense upon which it would proceed at trial; (2) admitting defendant's recorded interview with a police detective; (3) failing to instruct the jury on imperfect self-defense; (4) instructing the jury on wounds inflicted after the victim was felled; and (5) sentencing him for both the AWDWIKISI and AISBI offenses. We find no error in part, vacate in part, and remand for resentencing.

I. Background

On 23 September 2011, Lee Richardson and some of his family members were drinking alcohol together in a vacant lot adjacent to Richardson's mother's house. Around 2:00 p.m., defendant drove to the lot. Defendant bought Richardson a shot and a beer from a man selling alcohol out of his truck.

Shortly thereafter, defendant and Richardson began a fistfight. According to Richardson, the fight began because defendant insulted Richardson for grieving over the recent loss of his father. According to defendant, the fight began because Richardson demanded that defendant buy him another shot and another beer. The fight ended after about five minutes when others were able to separate the two men. After the fight, defendant told his cousin to drive him to his house so that he could get his gun to kill Richardson.

Defendant and his cousin drove away from the lot, and defendant returned about a minute and a half later. Defendant jumped out of his car while Richardson was walking to his mother's house. Richardson's mother told defendant that he should not shoot Richardson. Defendant responded that he was going to kill Richardson. Defendant walked up to

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Richardson and shot him in the abdomen with a handgun. Richardson fell to the ground, and defendant kicked him in the head. Defendant then drove away from the lot. After several days of treatment in the hospital, Richardson recovered from his injuries.

On or about 4 June 2012, a grand jury indicted defendant for attempted-first degree murder. *See* N.C. Gen. Stat. § 14-17 (2011). On or about 8 April 2013, a grand jury indicted defendant for AWDWIKISI and AISBI. *See* N.C. Gen. Stat. §§ 14-32(a), -32.4(a) (2011). On 9 August 2013, defendant moved to require the State to elect the offense upon which it would proceed at trial. At a hearing on or about 20 September 2013, the trial court orally denied this motion.

At trial, defendant testified that he never threatened to kill Richardson. Defendant testified that he returned to the lot after the fist-fight to deliver marijuana to another man there. Defendant further testified that he did not pick up a gun from his house; rather, he kept a gun under the driver's seat of his car. Defendant further testified that, in their final confrontation, Richardson approached him and threatened him. Defendant testified that he was afraid that another fight would aggravate a preexisting injury. Defendant also testified that he intended to shoot Richardson in the leg "to slow him down" and denied that he had any intent to kill Richardson.

On or about 10 December 2013, a jury found defendant guilty of all charges. The trial court sentenced defendant to 180 to 225 months' imprisonment for the attempted first-degree murder conviction. The trial court consolidated the AWDWIKISI and AISBI convictions and sentenced defendant to 67 to 90 months' imprisonment for those convictions. The trial court ordered that defendant serve these sentences consecutively. Defendant gave timely notice of appeal in open court.

II. Motion to Require the State to Elect

A. Standard of Review

We review double jeopardy issues *de novo*. *State v. Williams*, 201 N.C. App. 161, 173, 689 S.E.2d 412, 418 (2009).

B. Analysis

[1] Defendant contends that the trial court erred in denying his motion to require the State to elect the offense upon which it would proceed at trial. Defendant asserts that allowing the State to proceed on the attempted first-degree murder offense and the AWDWIKISI offense subjected him to double jeopardy.

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The Fifth Amendment of the U.S. Constitution provides that no person shall be “subject for the same offence to be twice put in jeopardy of life or limb[.]” U.S. Const. amend. V. The right to be free from double jeopardy is also rooted in article 1, section 19 of the North Carolina Constitution as “the law of the land” and in our common law. *State v. Ezell*, 159 N.C. App. 103, 106, 582 S.E.2d 679, 682 (2003); *see also* N.C. Const. art. 1, § 19. The double jeopardy clause prohibits (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple convictions for the same offense. *Ezell*, 159 N.C. App. at 106, 582 S.E.2d at 682.

In *State v. Tirado*, the North Carolina Supreme Court held that the trial court had not subjected the defendants to double jeopardy when it convicted them of attempted first-degree murder and AWDWIKISI, offenses arising from the same conduct. 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004), *cert. denied*, *Queen v. North Carolina*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). Following *Tirado*, we hold that the trial court did not subject defendant to double jeopardy when it denied his motion to require the State to elect between the attempted first-degree offense and the AWDWIKISI offense. *See id.*, 599 S.E.2d at 534.

III. Admission of Evidence

A. Preservation of Error

[2] Defendant contends that the trial court abused its discretion in admitting defendant’s recorded interview with a police detective, because many statements in the interview were inadmissible under North Carolina Rule of Evidence 403. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2013). At the trial court, defendant made a timely objection to the interview’s admission pursuant to Rule 403. The trial court admitted the interview and instructed the jury not to consider any questions or statements made by the detective for the truth of the matter asserted.

Relying on *State v. Howard*, the State contends that defendant failed to preserve this issue, because he makes new arguments on appeal for why the interview is inadmissible under Rule 403. *See* ____ N.C. App. ____, ____, 742 S.E.2d 858, 860 (2013), *aff’d per curiam*, 367 N.C. 320, 754 S.E.2d 417 (2014). But *Howard* is distinguishable. There, the defendant objected under Rule 403 at trial but argued under Rule 404(b) on appeal. *Id.* at ____, 742 S.E.2d at 860. In contrast, here, defendant has not changed the specific ground for his objection. Accordingly, we hold that defendant has preserved this issue. *See* N.C.R. App. P. 10(a)(1).

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B. Standard of Review

We review a trial court's Rule 403 determination for an abuse of discretion. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012); *see also* N.C. Gen. Stat. § 8C-1, Rule 403. "An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Ward*, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010) (quotation marks omitted).

C. Analysis

[3] Defendant contends that the trial court abused its discretion in admitting defendant's recorded interview with the detective, in contravention of Rule 403. *See* N.C. Gen. Stat. § 8C-1, Rule 403. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* "Unfair prejudice" means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, [on] an emotional one." *State v. Cunningham*, 188 N.C. App. 832, 836, 656 S.E.2d 697, 700 (2008).

Defendant argues that the recorded interview contained statements that had an undue tendency to suggest decision on an improper basis, specifically defendant's "own assessment of his actions and belief that he deserved to go to jail." But this basis for decision is not improper, and the fact that this evidence is prejudicial to defendant does not make it unfairly so. *See State v. Lambert*, 341 N.C. 36, 50, 460 S.E.2d 123, 131 (1995) (holding that the defendant's admission of guilt was highly probative and not unfairly prejudicial); *Cunningham*, 188 N.C. App. at 836, 656 S.E.2d at 700. We hold that the evidence's probative value was not substantially outweighed by the danger of unfair prejudice. *See* N.C. Gen. Stat. § 8C-1, Rule 403. Accordingly, we hold that the trial court did not violate Rule 403 in admitting this evidence.

III. Jury Instruction on Imperfect Self-Defense

A. Standard of Review

[4] Defendant next contends that the trial court committed plain error in instructing the jury on attempted first-degree murder but failing to instruct the jury on imperfect self-defense and the lesser-included offense of attempted voluntary manslaughter. "For an appellate court to find plain error, it must first be convinced that, absent the error, the jury

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would have reached a different verdict. The defendant has the burden of showing that the error constituted plain error.” *State v. Wade*, 213 N.C. App. 481, 493, 714 S.E.2d 451, 459 (2011), *disc. rev. denied*, 366 N.C. 228, 726 S.E.2d 181 (2012) (citations and quotation marks omitted). Thus, on plain error review, the defendant must first demonstrate that the trial court committed error, and next “that absent the error, the jury probably would have reached a different result.” *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602, *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003). “So, if defendant has failed to show that the purported error would have led to a different result, we need not consider whether an error was actually made.” *State v. Larkin*, ___ N.C. App. ___, ___, 764 S.E.2d 681, 685 (2014).

B. Analysis

[I]f defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant’s belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the *imperfect right of self-defense*, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter.

An imperfect right of self-defense is thus available to a defendant who reasonably believes it necessary to kill the deceased to save himself from death or great bodily harm even if defendant (1) might have brought on the difficulty, provided he did so *without* murderous intent, and (2) might have used excessive force. Imperfect self-defense therefore incorporates the first two requirements of perfect self-defense, but not the last two. Murderous intent means the intent to kill or inflict serious bodily harm.

If one brings about an affray with the intent to take life or inflict serious bodily harm, he is not entitled even to the doctrine of imperfect self-defense; and if he kills during the affray he is guilty of murder. If one takes life, though in defense of his own life,

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in a quarrel which he himself has commenced with intent to take life or inflict serious bodily harm, the jeopardy into which he has been placed by the act of his adversary constitutes no defense whatever, but he is guilty of murder. But, if he commenced the quarrel with no intent to take life or inflict grievous bodily harm, then he is not acquitted of all responsibility for the affray which arose from his own act, but his offense is reduced from murder to manslaughter.

State v. Mize, 316 N.C. 48, 52-53, 340 S.E.2d 439, 441-42 (1986) (citations and quotation marks omitted).

Here, the State introduced abundant testimony supporting a finding of defendant's murderous intent in his final confrontation with Richardson. Three witnesses testified that after the fistfight, defendant stated that he was going to kill Richardson. Five witnesses testified that, in their final confrontation, Richardson did not threaten or move toward defendant, but defendant walked up to Richardson and shot him. We hold that this evidence of defendant's murderous intent strongly weighs against the application of imperfect self-defense. *See id.* at 52-53, 340 S.E.2d at 441-42. In light of this evidence, we hold that defendant has failed to demonstrate that, had the trial court instructed the jury on imperfect self-defense, the jury probably would have acquitted defendant on the attempted first-degree murder charge. *See Wade*, 213 N.C. App. at 493, 714 S.E.2d at 459; *Larkin*, ___ N.C. App. at ___, 764 S.E.2d at 685. Accordingly, we hold that the trial court committed no plain error on this issue. *See Wade*, 213 N.C. App. at 493, 714 S.E.2d at 459; *Larkin*, ___ N.C. App. at ___, 764 S.E.2d at 685.

IV. Jury Instruction on Wounds Inflicted After Victim Was Felled

A. Standard of Review

We review *de novo* a trial court's decision regarding jury instructions. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

B. Analysis

[5] Defendant next contends that the trial court erred in instructing the jury that it could consider wounds inflicted after Richardson was felled in determining whether defendant acted with premeditation and deliberation. Defendant specifically asserts that evidence does not support a

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finding that defendant inflicted wounds on Richardson after Richardson was felled. Here, the trial court gave the following jury instruction:

Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances by which they may be inferred such as lack of provocation by the victim; conduct of the defendant before, during, and after the attempted killing; threats and declarations of the defendant; use of grossly excessive force; or inflictions of wounds after the victim is fallen.

In *State v. Leach*, the North Carolina Supreme Court examined a similar jury instruction and held that the trial court did not err by giving the instruction, “even in the absence of evidence to support each of the circumstances listed.” 340 N.C. 236, 242, 456 S.E.2d 785, 789 (1995). The Court adopted the following reasoning:

The instruction in question informs a jury that the circumstances given are only illustrative; they are merely examples of some circumstances which, if shown to exist, permit premeditation and deliberation to be inferred. The instruction tells jurors that they “may” find premeditation and deliberation from certain circumstances, “such as” the circumstances listed. The instruction does not preclude a jury from finding premeditation and deliberation from direct evidence or other circumstances; more importantly, it does not indicate to the jury that the trial court is of the opinion that evidence exists which would support each or any of the circumstances listed.

Id. at 241-42, 456 S.E.2d at 789. Similarly, the jury instruction here explains that the jury “may” find premeditation and deliberation from certain circumstances, “such as” the circumstances listed. *See id.* at 241, 456 S.E.2d at 789. The instruction does not indicate that the trial court believes that evidence supports each or any of the circumstances listed. *See id.* at 242, 456 S.E.2d at 789. Following *Leach*, we hold that the trial court did not err in submitting this jury instruction. *See id.*, 456 S.E.2d at 789.

V. Sentencing

A. Preservation of Error

[6] Defendant contends that the trial court violated his constitutional right to be free from double jeopardy when it sentenced him for both

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the AWDWIKISI and AISBI offenses. Defendant did not raise this constitutional issue at the trial court.¹ Relying on *State v. Moses*, defendant argues that this issue is preserved under N.C. Gen. Stat. § 15A-1446(d) (18) (2013). *See* 205 N.C. App. 629, 638, 698 S.E.2d 688, 695 (2010). But the North Carolina Supreme Court has held that a defendant may not raise a constitutional issue, including a double jeopardy issue, for the first time on appeal. *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010); *see also State v. Kirkwood*, ___ N.C. App. ___, ___, 747 S.E.2d 730, 736, *appeal dismissed*, ___ N.C. ___, 752 S.E.2d 487 (2013) (rejecting the defendant's argument that his double jeopardy argument was preserved under N.C. Gen. Stat. § 15A-1446(d)(18)). Accordingly, we hold that defendant has failed to preserve this issue. *See Davis*, 364 N.C. at 301, 698 S.E.2d at 67.

B. North Carolina Rule of Appellate Procedure 2

[7] Defendant next requests that we apply North Carolina Rule of Appellate Procedure 2 and review this double jeopardy issue. *See* N.C.R. App. P. 2 (“To prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it[.]”). “The decision to review an unpreserved argument relating to double jeopardy is entirely discretionary.” *State v. Rawlings*, ___ N.C. App. ___, ___, 762 S.E.2d 909, 915, *disc. rev. denied*, ___ N.C. ___, 766 S.E.2d 627 (2014). Rule 2 discretion should be exercised “cautiously” and only in “exceptional circumstances.” *Williams*, 201 N.C. App. at 173, 689 S.E.2d at 418. In *Rawlings*, this Court determined that vacating one of the defendant's convictions would not reduce the defendant's total sentence, since the trial court had ordered that the sentences run concurrently. ___ N.C. App. at ___, 762 S.E.2d at 915. This Court declined to apply Rule 2, because granting the defendant's requested relief “would not alter the total time defendant is required to serve[.]” *Id.* at ___, 762 S.E.2d at 915.

Relying on *Rawlings*, the State argues that we should decline to invoke Rule 2, because the purported double jeopardy violation does not prejudice defendant. *See id.* at ___, 762 S.E.2d at 915. If we were to hold that the trial court subjected defendant to double jeopardy, we would vacate defendant's AISBI conviction. *See Ezell*, 159 N.C. App. at 111, 582 S.E.2d at 685. The State contends that vacating defendant's AISBI conviction would not reduce his total sentence, because the trial

1. Although defendant moved to require the State to elect between the attempted first-degree murder and AWDWIKISI offenses, defendant did not raise a double jeopardy argument at trial with respect to the AWDWIKISI and AISBI offenses.

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court consolidated defendant's AWDWIKISI and AISBI convictions into a single sentence. Relying on *State v. Wortham*, defendant responds that vacating his AISBI conviction may reduce his total sentence. *See* 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987). In *Wortham*, the North Carolina Supreme Court held that

[s]ince it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated.

Id., 351 S.E.2d at 297. Although defendant concedes that the trial court sentenced him to the to the minimum presumptive range for the AWDWIKISI offense given his prior record level, defendant argues that the purported double jeopardy violation probably influenced the trial court's decision to order that his consolidated sentence for the AWDWIKISI and AISBI convictions run consecutively, rather than concurrently, with his sentence for the attempted first-degree murder conviction. Defendant also argues that the purported double jeopardy violation probably influenced the trial court's decision to find no mitigating factors despite the fact that defendant presented evidence of mitigating factors.

In the event we vacate defendant's AISBI conviction, we must remand this case for resentencing. *See id.*, 351 S.E.2d at 297; *Williams*, 201 N.C. App. at 174, 689 S.E.2d at 419. In *Williams*, this Court invoked Rule 2 and reviewed the defendant's double jeopardy issue. *Williams*, 201 N.C. App. at 173, 689 S.E.2d at 418. After vacating the defendant's conviction for assault by strangulation, this Court followed *Wortham* and remanded the case for resentencing, because the trial court had consolidated that conviction with three other convictions into a single sentence. *Id.* at 174, 689 S.E.2d at 419. In light of *Williams*, we choose to exercise our Rule 2 discretionary power given that on remand the trial court may order that the remaining sentences run concurrently or may find mitigating factors. *See id.* at 173-74, 689 S.E.2d at 418-19.

Relying on *State v. Goldston* and *State v. Curry*, the State contends that we need not remand for resentencing in the event we vacate defendant's AISBI conviction. *See Goldston*, 343 N.C. 501, 504, 471 S.E.2d 412, 414 (1996); *Curry*, 203 N.C. App. 375, 379, 692 S.E.2d 129, 134, *appeal*

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dismissed and disc. rev. denied, 364 N.C. 437, 702 S.E.2d 496 (2010). But *Goldston* and *Curry* are distinguishable. In both cases, after vacating one but not all of the convictions in a consolidated sentence, the appellate court left the consolidated sentence undisturbed, because the remaining conviction was for felony murder, which required a life sentence. *Goldston*, 343 N.C. at 504, 471 S.E.2d at 414; *Curry*, 203 N.C. App. at 379, 692 S.E.2d at 134. In contrast, here, the trial court may order that the remaining sentences run concurrently or may find mitigating factors. Accordingly, we choose to exercise our discretionary power to review defendant's sentencing issue. *See Williams*, 201 N.C. App. at 173-74, 689 S.E.2d at 418-19.

C. Standard of Review

We review double jeopardy issues *de novo*. *Id.* at 173, 689 S.E.2d at 418. "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *State v. Jones*, ___ N.C. App. ___, ___, 767 S.E.2d 341, 344 (2014).

D. Analysis

The Fifth Amendment of the U.S. Constitution provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. The right to be free from double jeopardy is also rooted in article 1, section 19 of the North Carolina Constitution as "the law of the land" and in our common law. *Ezell*, 159 N.C. App. at 106, 582 S.E.2d at 682; *see also* N.C. Const. art. 1, § 19. The double jeopardy clause prohibits (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple convictions for the same offense. *Ezell*, 159 N.C. App. at 106, 582 S.E.2d at 682. We are concerned here with the third category, as defendant alleges that he received multiple punishments for the same offense.

In *Blockburger v. United States*, the U.S. Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. 299, 304, 76 L. Ed. 306, 309 (1932). In *Missouri v. Hunter*, the U.S. Supreme Court clarified that the *Blockburger* test is a rule of statutory construction and should not control when there is a clear indication of contrary legislative intent. 459 U.S. 359, 367, 74 L. Ed. 2d 535, 543 (1983). In *State v. Gardner*, the North Carolina Supreme Court explained that

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the presumption raised by the *Blockburger* test is only a federal rule for determining legislative intent as to violations of federal criminal laws and is neither binding on state courts nor conclusive. When utilized, it may be rebutted by a clear indication of legislative intent; and, when such intent is found, it must be respected, regardless of the outcome of the application of the *Blockburger* test.

315 N.C. 444, 455, 340 S.E.2d 701, 709 (1986); *see also State v. Bailey*, 157 N.C. App. 80, 87, 577 S.E.2d 683, 688 (2003) (holding that the double jeopardy clause prohibited the defendant from being convicted of the separate crimes of possession of stolen goods and possession of a stolen motor vehicle, because “the [l]egislature did not intend to punish a defendant for possession of the same property twice”).

In *Ezell*, this Court held that the trial court subjected the defendant to double jeopardy by convicting him for assault with a deadly weapon inflicting serious injury (“ADWISI”) under N.C. Gen. Stat. § 14-32(b) and for AISBI under N.C. Gen. Stat. § 14-32.4, offenses arising from the same conduct. *Ezell*, 159 N.C. App. at 111, 582 S.E.2d at 685. This Court examined the statutory language of N.C. Gen. Stat. § 14-32.4, which proscribed an assault inflicting serious bodily harm “unless the conduct is covered under some other provision of law providing greater punishment.” *Id.* at 110, 582 S.E.2d at 684 (quoting N.C. Gen. Stat. § 14-32.4 (2001)). This Court held that, because the defendant was convicted for ADWISI, an offense which provided greater punishment than AISBI, the trial court subjected the defendant to double jeopardy by convicting him of AISBI. *Id.* at 111, 582 S.E.2d at 685.

Here, defendant was convicted for AWDWIKISI under N.C. Gen. Stat. § 14-32(a), a Class C felony, and AISBI, under N.C. Gen. Stat. § 14-32.4(a), a Class F felony. *See* N.C. Gen. Stat. §§ 14-32(a), -32.4(a) (2011). N.C. Gen. Stat. § 14-32.4(a) proscribes an assault inflicting serious bodily harm “[u]nless the conduct is covered under some other provision of law providing greater punishment[.]” N.C. Gen. Stat. § 14-32.4(a) (2011). Adopting this Court’s reasoning in *Ezell*, we hold that the double jeopardy clause prohibits defendant’s AISBI conviction given this statutory language. *See id.*; *Ezell*, 159 N.C. App. at 111, 582 S.E.2d at 685.

Relying on *State v. Hannah*, the State contends that the double jeopardy clause does not prohibit defendant’s AISBI conviction, because AISBI is not a lesser-included offense of AWDWIKISI. 149 N.C. App. 713, 719, 563 S.E.2d 1, 5, *disc. rev. denied*, 355 N.C. 754, 566 S.E.2d 81 (2002). But the State’s reliance on *Hannah* is misplaced. There, this Court held

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that AISBI is not a lesser-included offense of AWDWIKISI in the context of a lesser-included jury instruction, not double jeopardy. *Id.*, 563 S.E.2d at 5. Although this holding suggests that defendant's AWDWIKISI and AISBI convictions survive the *Blockburger* test, the presumption raised by this test "may be rebutted by a clear indication of legislative intent" and "when such intent is found, it must be respected, regardless of the outcome of the application of the *Blockburger* test." *See Gardner*, 315 N.C. at 455, 340 S.E.2d at 709. As discussed above, we hold that the statutory language of N.C. Gen. Stat. § 14-32.4(a) evinces a clear indication of legislative intent. *See id.*, 340 S.E.2d at 709; N.C. Gen. Stat. § 14-32.4(a).

The State also relies on *State v. Fernandez* for the proposition that examining legislative intent is unnecessary when two crimes are deemed separate under the *Blockburger* test. 346 N.C. 1, 19, 484 S.E.2d 350, 361 (1997). But *Fernandez* is distinguishable. There, the North Carolina Supreme Court addressed whether the trial court had subjected the defendant to double jeopardy by convicting him of first-degree murder and first-degree kidnapping. *Id.* at 18, 484 S.E.2d at 361. After holding that the defendant had failed to preserve this issue, the Court stated, in dicta, that the crimes were separate under the *Blockburger* test and that "an analysis of legislative intent [was] not necessary in [that] case[.]" *Id.* at 19, 484 S.E.2d at 361. The first-degree murder and first-degree kidnapping statutes at issue contained no language limiting a defendant's conviction for both offenses. *See* N.C. Gen. Stat. §§ 14-17, -39 (1993). In contrast, here, N.C. Gen. Stat. § 14-32.4(a) proscribes an assault inflicting serious bodily harm "[u]nless the conduct is covered under some other provision of law providing greater punishment[.]" N.C. Gen. Stat. § 14-32.4(a); *see also Ezell*, 159 N.C. App. at 109, 582 S.E.2d at 684 (similarly distinguishing *Fernandez*).

Additionally, in *Gardner*, the North Carolina Supreme Court characterized the presumption raised by the *Blockburger* test as "an aid to determining legislative intent" and "neither binding on state courts nor conclusive" and rebuttable "by a clear indication of legislative intent[.]" which "must be respected, regardless of the outcome of the application of the *Blockburger* test." *Gardner*, 315 N.C. at 455, 340 S.E.2d at 709. Moreover, in *Davis*, the North Carolina Supreme Court recently adopted this Court's reasoning in *Ezell* and held that the trial court "was not authorized to sentence defendant for felony death by vehicle and felony serious injury by vehicle." 364 N.C. at 304-05, 698 S.E.2d at 69-70. Although the Court discussed this issue in the context of statutory authority, rather than constitutional double jeopardy, its thorough analysis of legislative intent and approval of *Ezell* support our conclusion that

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the *Blockburger* test does not end our double jeopardy inquiry. *See id.*, 698 S.E.2d at 69-70; *Ezell*, 159 N.C. App. at 109, 582 S.E.2d at 684 (“[W]e are not required to start and end our inquiry with a *Blockburger* analysis of elements.”). Furthermore, in *Williams*, this Court followed *Ezell* and held that the defendant’s convictions violated double jeopardy despite the fact that the convictions survived the *Blockburger* test. *Williams*, 201 N.C. App. at 173-74, 689 S.E.2d at 418-19. Finally, our emphasis on legislative intent is consistent with the U.S. Supreme Court’s double jeopardy jurisprudence. *See Hunter*, 459 U.S. at 366, 74 L. Ed. 2d at 542 (“With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.”).

Accordingly, we hold that the trial court subjected defendant to double jeopardy by convicting him for both AWDWIKISI and AISBI. *See Ezell*, 159 N.C. App. at 111, 582 S.E.2d at 685.

VI. Conclusion

For the foregoing reasons, we hold that the trial court committed no error in convicting defendant for attempted first-degree murder and AWDWIKISI. But we vacate defendant’s AISBI conviction. *See id.*, 582 S.E.2d at 685. We also vacate defendant’s consolidated sentence for the AWDWIKISI and AISBI convictions and remand the case for resentencing on defendant’s AWDWIKISI conviction. *See Wortham*, 318 N.C. at 674, 351 S.E.2d at 297.

NO ERROR IN PART, VACATED IN PART, AND REMANDED.

Judges BRYANT and HUNTER, JR. concur.

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[240 N.C. App. 428 (2015)]

STATE OF NORTH CAROLINA

v.

KENNETH E. CLYBURN, DEFENDANT

No. COA13-1445

Filed 7 April 2015

1. Appeal and Error—issue raised for first time on appeal

The Court of Appeals declined to address whether defendant's general consent to a search of his person extended to the digital contents of a GPS device because the State did not make that argument before the trial court.

2. Search and Seizure—search incident to arrest—digital contents of GPS device—not justified

In its order granting defendant's motion to suppress, the trial court properly concluded that a search of the digital contents of a GPS device found on defendant's person was not justified as a search incident to arrest. An individual's privacy interests in the digital contents of a GPS device are great, and a search of such a device does not further the government's interests in officer safety or the preservation of evidence.

3. Search and Seizure—reasonable expectation of privacy—digital contents of stolen GPS device

The Court of Appeals reversed and remanded the trial court's order granting in part defendant's motion to suppress evidence obtained from a search of the digital contents of a stolen GPS device found on his person. The trial court was instructed to make findings of fact regarding the manner in which defendant obtained the stolen device to determine whether he had a reasonable expectation of privacy in its digital contents.

Appeal by the State from order entered 11 July 2013 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellee.

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GEER, Judge.

The State appeals from an order granting in part defendant Kenneth E. Clyburn's motion to suppress evidence obtained as a result of a search of the digital contents of a GPS device found on defendant's person which, as a result of the search, was determined to have been stolen. On appeal, the State argues that the trial court erred in granting the motion because defendant did not have a reasonable expectation of privacy in the GPS and, therefore, cannot show that his Fourth Amendment rights were violated. Alternatively, the State argues that even assuming that the defendant did have a privacy interest in the GPS, the search was valid because (1) defendant consented to the search and (2) the search was justified as a search incident to arrest.

Because the State did not raise the consent argument below, we decline to address it. We hold that the United States Supreme Court's recent decision in *Riley v. California*, ___ U.S. ___, 189 L. Ed. 2d 430, 134 S. Ct. 2473 (2014), applies to the search of the digital data stored on a GPS device, and affirm the trial court's conclusion that the search incident to arrest exception does not apply in this case. With respect to defendant's privacy interest in the stolen GPS, we hold that a defendant may have a legitimate expectation of privacy in a stolen item if he acquired it innocently and does not know that the item was stolen. At the suppression hearing, defendant presented evidence that, if believed, would allow the trial court to conclude that defendant had a legitimate possessory interest in the GPS. Because the trial court failed to make a factual determination regarding whether defendant innocently purchased the GPS, we reverse and remand for further findings of fact.

Facts

On 2 April 2012, police officers Aaron Skipper and Todd Watson of the Charlotte-Mecklenburg Police Department ("CMPD") were on motorcycle patrol in the residential neighborhood of Villa Heights in Charlotte, North Carolina. The officers were on the lookout for evidence of residential and auto break-ins and sales of controlled substances.

Just before 8:00 a.m., the officers saw defendant walking down the sidewalk of Umstead Street. Defendant was dirty, had numerous tears in his clothing, "unusually bulging pants pockets . . . [and] could have passed for one of the homeless common to the area." Officer Watson initially suspected that defendant "may have recently been under an abandoned house removing copper pipes for resale" due to his dirty condition.

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The officers pulled up about five feet behind defendant as he was walking down the street. Defendant stopped and turned towards the officers, at which point Officer Skipper dismounted, told defendant the officers' names and why they were in the area, and asked for defendant's name and date of birth. Defendant did not have identification on him, but told the officers his name and date of birth and explained that he was walking to his mother's house around the corner. The conversation was polite, and defendant was cooperative.

The officers did not make any show of force or attempt to block defendant's path. Defendant turned and began walking away from the direction of his mother's address, at which point Officer Skipper reengaged defendant and asked him what he had in his rear pocket. Defendant stopped and removed a cell phone. Officer Skipper asked what else he had in that pocket, and defendant removed a pair of binoculars.

Officer Skipper then approached defendant and asked for consent to search his person. Defendant said "go ahead," turned his back to the officer, and raised his arms. Officer Skipper found a crack pipe in defendant's waistband and arrested defendant for possession of drug paraphernalia. Officer Skipper then searched defendant incident to the arrest, finding a box cutter, several small shards of auto glass, and a Garmin GPS with an attached car charger in defendant's pants pockets. Defendant, unprompted, claimed that the GPS was his own and that the binoculars belonged to his brother.

The officers had no knowledge of whether defendant had a car, but they thought it unusual that he was walking with a GPS and attached charger cord in his pocket. Officer Watson took the GPS and pressed the "Home" button. He did not ask for, or receive, permission from defendant to search the GPS. The GPS displayed an address in Blowing Rock, North Carolina – approximately 90 miles from Charlotte, North Carolina. Officer Watson then scrolled through the address history of the GPS and found the closest address to their current location was several blocks away on Pecan Avenue, in the opposite direction from where defendant's mother lived.

CMPD sent a patrol car to the Pecan Avenue address and located a car in the driveway of a home with the window broken out. On the seat of the car was an owner's manual for a GPS of the same make and model as that taken from defendant. CMPD then contacted the homeowner, who was not aware of the car break-in. The homeowner identified the GPS taken from defendant as his.

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Defendant was charged with felony breaking and entering a motor vehicle, misdemeanor larceny, and possession of drug paraphernalia. On 23 April 2012, defendant was indicted on those same charges in addition to being a habitual felon. Defendant moved to suppress the evidence obtained as a result of the search of his person and a hearing was held on his motion on 1 July 2013.

At the hearing, defendant testified that on the morning of 2 April 2012, he left his girlfriend's house to walk to his mother's home and on the way he purchased the GPS from a man who sold it for \$10 to \$15. He testified that he did not know that the GPS belonged to someone else.

In an order entered 11 July 2013, the trial court concluded that the initial encounter between the officers and defendant was consensual and that the second encounter was an investigatory stop that was based upon the officer's reasonable suspicion that defendant had been or was engaged in criminal activity. The trial court concluded that defendant consented to a search of his person and that when the officers found the crack pipe in defendant's waistband, they had probable cause to arrest him for possession of drug paraphernalia.

The trial court concluded that the search of the GPS device was not necessary to prevent defendant from using a weapon or destroying evidence and, therefore, was not justified as a search incident to arrest. The trial court concluded that the crack pipe was admissible, but that any evidence obtained as a result of the search of the digital contents of the GPS was inadmissible. The State timely appealed the order to this Court.

Discussion

The sole issue on appeal is whether the trial court erred in granting defendant's motion to suppress the evidence obtained from the officers' search of the contents of the GPS device. Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

[1] On appeal, the State argues that the trial court erred in granting in part the motion to suppress because defendant did not have a reasonable expectation of privacy in the GPS and, therefore, cannot show that his Fourth Amendment rights were violated. Alternatively, the State

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argues that even assuming that the defendant did have a privacy interest in the GPS, the search was valid because (1) defendant consented to the search and (2) the search was justified as a search incident to arrest.

With respect to consent, the trial court found that defendant gave Officer Skipper consent to search his person. It additionally found, however, that the officer who searched the GPS, Officer Watson, neither asked for nor received permission to do so. The State argues that because defendant consented to the initial search of his person and did not limit the scope of the search or tell the officers not to search the GPS, his consent could reasonably be interpreted to cover a search of the GPS. The State did not, however, make this argument to the trial court. In fact, at the suppression hearing, the State asserted that the interactions between the officers and the defendant “were completely consensual *up until the point the Defendant was placed under arrest for the possession of paraphernalia*.” (Emphasis added.)

“This Court has long held that issues and theories of a case not raised below will not be considered on appeal[.]” *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001). Otherwise stated, “the law does not permit parties to swap horses between courts in order to get a better mount” on appeal. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). Because the State did not argue below that defendant’s general consent to search his person extended to the search of the digital contents of the GPS, we decline to address this argument on appeal.

[2] We turn now to the State’s argument that the search of the digital contents of the GPS was a valid search incident to arrest. It is well established that “ ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.’ ” *Arizona v. Gant*, 556 U.S. 332, 338, 173 L. Ed. 2d 485, 493, 129 S. Ct. 1710, 1716 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585, 88 S. Ct. 507, 514 (1967)). Searches of the person and the area immediately surrounding the person incident to arrest are reasonable (1) “to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape,” or (2) to secure “any evidence on the arrestee’s person in order to prevent its concealment or destruction.” *Chimel v. California*, 395 U.S. 752, 763, 23 L. Ed. 2d 685, 694, 89 S. Ct. 2034, 2040 (1969).

In *United States v. Robinson*, 414 U.S. 218, 235, 38 L. Ed. 2d 427, 440, 94 S. Ct. 467, 477 (1973), the Court held that a case-by-case adjudication

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is not required to determine whether either rationale set forth in *Chimel* supports the search of an arrestee's person incident to their lawful arrest. Rather, "[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *Id.*

The rule set forth in *Robinson* was recently narrowed by the United States Supreme Court in *Riley*, a case involving the warrantless search, incident to arrest, of data stored on the arrestee's cell phone that had been seized from the arrestee's pants pocket. Acknowledging that *Chimel* and *Robinson* were decided before modern cell phone technology had been invented, the Court began its analysis with the principle that courts "generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Riley*, ___ U.S. at ___, 189 L. Ed. 2d at 441, 134 S. Ct. at 2484 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300, 143 L. Ed. 2d 408, 414, 119 S. Ct. 1297, 1300 (1999)).

Applying these considerations to the search of digital data on a cell phone, the Court held:

[W]hile *Robinson*'s categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest side, *Robinson* concluded that the two risks identified in *Chimel* -- harm to officers and destruction of evidence -- are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, *Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.

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Id. at ___, 189 L. Ed. 2d at 441-42, 134 S. Ct. at 2484-85. Thus, the search of digital data on a cell phone did not further government interests in officer safety or preventing the destruction of evidence because “[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee’s escape” and “once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.” *Id.* at ___, ___, 189 L. Ed. 2d at 442, 443, 134 S. Ct. at 2485, 2486.

In contrast, the Court considered an arrestee’s privacy interests in the digital data on a cell phone to be great, due in large part to “their immense storage capacity”:

The storage capacity of cell phones has several inter-related consequences for privacy. First, a cell phone collects in one place many distinct types of information – an address, a note, a prescription, a bank statement, a video – that reveal much more in combination than any isolated record. Second, a cell phone’s capacity allows even just one type of information to convey far more than previously possible. The sum of an individual’s private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

Id. at ___, 189 L. Ed. 2d at 447, 134 S. Ct. at 2489.

We believe that the same analysis applies to the search of the digital data on the GPS device in this case. As in *Riley*, the search of the GPS did not further any government interest in protecting officer safety or in preventing the destruction of evidence. In contrast, the individual privacy interests in the data on the GPS are great. The type of data that may be found on a GPS device was specifically mentioned by the *Riley* Court in distinguishing the digital data that can be stored on a cell phone from the type of data that is typically stored in physical records found on one’s person:

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Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building. See *United States v. Jones*, 565 U.S. ___, ___, 132 S. Ct. 945, 955, 181 L. Ed. 2d 911, 925 (2012) (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").

Id. at ___, 189 L. Ed. 2d at 448, 134 S. Ct. at 2490. Although a GPS typically does not store as vast an amount of information as a modern cell phone, an individual's expectation of privacy in the digital contents of a GPS outweighs the government's interests in officer safety and the destruction of evidence.

The State, nevertheless, argues that the GPS should be viewed as a type of "digital container" and treated the same as an address book, a wallet, or a purse. The *Riley* Court, however, expressly rejected this approach because "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom." *Id.* at ___, 189 L. Ed. 2d at 446, 134 S. Ct. at 2488-89. The Court also declined to create a rule "under which officers could search cell phone data if they could have obtained the same information from a pre-digital counterpart" because such a rule would allow officers to search a much larger amount of information than previously allowed or contemplated and it would "launch courts on a difficult line-drawing expedition to determine which digital files are comparable to physical records." *Id.* at ___, 189 L. Ed. 2d at 450, 451, 134 S. Ct. at 2493. Accordingly, we find the State's arguments unpersuasive, and we hold that the trial court properly concluded that the search was not justified as a search incident to arrest.

[3] The State nonetheless contends that defendant's Fourth Amendment rights were not violated by the search of the digital contents of the GPS because defendant did not have a legitimate expectation of privacy in the GPS given that it was stolen. "[I]n order to claim the protection of

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the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; *i.e.*, one that has ‘a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.’ ” *Minnesota v. Carter*, 525 U.S. 83, 88, 142 L. Ed. 2d 373, 379, 119 S. Ct. 469, 472 (1998) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 n.12, 58 L. Ed. 2d 387, 401 n.12, 99 S. Ct. 421, 430 n.12 (1978)). The defendant bears the burden of proving that he had a legitimate expectation of privacy in the item searched. *Rawlings v. Kentucky*, 448 U.S. 98, 104, 65 L. Ed. 2d 633, 641, 100 S. Ct. 2556, 2561 (1980). *See also State v. Mackey*, 209 N.C. App. 116, 122, 708 S.E.2d 719, 723 (2011) (“With regard to defendant’s standing to challenge the legality of a search, the burden rests with defendant to prove that he had a legitimate expectation of privacy in the item that was searched.”).

The State argues that a defendant never has a reasonable expectation of privacy in a stolen item. Indeed, “[i]t is a general rule of law in this jurisdiction that one may not object to a search or seizure of the premises or property of another.” *State v. Greenwood*, 301 N.C. 705, 707, 273 S.E.2d 438, 440 (1981). Therefore, at a suppression hearing, the defendant must show that he has an “ownership or possessory interest” in the item searched before he may challenge the search of the item. *State v. Mandina*, 91 N.C. App. 686, 695, 373 S.E.2d 155, 161 (1988).

Defendant, however, points to 6 Wayne R. LaFave, *Search and Seizure* § 11.3(f) p. 290 (5th ed. 2012), which explains that a defendant can challenge the search of a stolen item by “establish[ing] that the police actually interfered with his person or with a place as to which he had a reasonable expectation of privacy.” Thus, defendants have been able to challenge the search of stolen property when the search interfered with other well-established privacy concerns.

In particular, defendant cites *Arizona v. Hicks*, 480 U.S. 321, 94 L. Ed. 2d 347, 107 S. Ct. 1149 (1987), in which the Supreme Court held that moving stolen stereo equipment located inside the defendant’s home in order to record the serial numbers constituted an unlawful search under the Fourth Amendment. As explained by the Second Circuit, “because the Supreme Court in *Hicks* held that the search of the stereo equipment was unlawful, it necessarily also found . . . that the defendant had a legitimate expectation of privacy in that equipment, despite its having been stolen.” *United States v. Haqq*, 278 F.3d 44, 50 (2d Cir. 2002). The expectation of privacy in the stolen equipment “reflects a

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conclusion that exclusive custody and control of an item within one's home is sufficient to establish a reasonable expectation of privacy in that item." *Id.* at 51. Thus, "[t]he controlling factor in *Hicks* was that the stolen property was inside Hicks' apartment where he clearly had an expectation of privacy[.]" *Shaver v. Commonwealth*, 30 Va. App. 789, 799-800, 520 S.E.2d 393, 398 (1999).

Similarly, in *McFerguson v. United States*, 770 A.2d 66, 71 (D.C. 2001), the defendant challenged the search of a plastic bag defendant was carrying at the time police officers stopped him in connection with a burglary, even though the bag was found to contain items allegedly stolen during the burglary. Citing the principle that " 'a street pedestrian has a reasonable expectation of privacy in covered objects associated with his person[.]" the court concluded that "[t]he contents of the bag were 'sufficiently physically connected with [the defendant's] person to fall properly under the umbrella of protection of personal privacy.' " *Id.* (quoting *Godfrey v. United States*, 408 A.2d 1244, 1246-47 (D.C. 1979)).

Defendant argues that, like the search in *McFerguson*, the search in this case interfered with his reasonable expectation of privacy in his person. We disagree. Although the initial search and seizure of the GPS from defendant's pocket interfered with defendant's legitimate expectation of privacy in his person, the trial court found, and defendant does not dispute, that he gave the officers consent for that search. The search that defendant seeks to challenge is not the initial search of his person, but rather the subsequent search of the digital contents of the GPS after it had been seized. That part of the search did not, in any way, interfere with his legitimate expectation of privacy in his person.

Consequently, the question remains whether defendant had a reasonable expectation of privacy with respect to the GPS. With respect to searches of stolen property that do not fall under the umbrella of a defendant's reasonable expectation of privacy in his home or person, the case law suggests that a defendant may nevertheless challenge the search if he can show at the suppression hearing that he acquired the stolen property innocently and did not know that the item was stolen. As recognized by the Maryland Court of Special Appeals, "[t]he legitimacy of one's expectation of privacy [in a stolen item] is in large measure a function of its reasonableness, and that, in turn, is determined to some extent by the elements of time, place, and circumstance. There may well be situations, for example, in which the unlawfulness of an initial acquisition can become attenuated by other factors, such as . . . an honest, though mistaken, belief that the object in question actually belongs to

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[the defendant] – that his acquisition of it was not unlawful.” *Graham v. State*, 47 Md. App. 287, 294, 421 A.2d 1385, 1389 (1980).

Thus, how the defendant acquired the stolen property and whether he knew that the property was stolen are relevant considerations in determining whether his expectation of privacy in the item is reasonable. See *United States v. Tropiano*, 50 F.3d 157, 161 (2d Cir. 1995) (holding that “a defendant who *knowingly* possesses a stolen car has no legitimate expectation of privacy in the car” (emphasis added)); *United States v. Hargrove*, 647 F.2d 411, 413 (4th Cir. 1981) (“[I]n view of his burden to establish standing to contest the search [of a stolen car] at the suppression hearing, it sufficed at the very least to require him to show, if he could, that he acquired the car innocently.”).

In this case, defendant does not dispute that the GPS had been stolen from its original owner, but argues that he presented evidence at the hearing from which the trial court could determine that he acquired the GPS innocently and did not know that the GPS was stolen. Defendant testified at the suppression hearing that he bought the GPS from an unidentified man at the gas station for \$10 or \$15 shortly before he encountered the officers. Although the trial court found that “[d]efendant claimed the GPS as his own[,]” the trial court failed to make a factual determination as to whether defendant had, in fact, purchased the GPS, and, if so, whether defendant knew or should have known that the GPS was stolen. Because these determinations were necessary to determine whether defendant had a reasonable expectation of privacy in the GPS, we reverse and remand for further findings of fact.

On remand, the trial court must determine, for purposes of the motion to suppress, whether defendant purchased the GPS as he claimed at the suppression hearing. In the event that the trial court believes that defendant purchased the GPS, it must then determine whether defendant knew or should have known that the GPS was stolen. In making this determination, we find *State v. Parker*, 316 N.C. 295, 341 S.E.2d 555 (1986), instructive. In *Parker*, our Supreme Court recognized that, in the context of convictions for possession or receipt of stolen property, the “knowing” element of those offenses may be satisfied by evidence that there were reasonable grounds to believe that the item was stolen. *Id.* at 304, 341 S.E.2d at 560. Such evidence includes “unusual” “mechanics of the transaction,” a lack of documentation of the sale, such as failure to receive a title of a vehicle, a seller’s “willingness to sell the property at a mere fraction of its actual value,” a buyer’s purchase of “property at a fraction of its actual cost,” or flight from police, which “is evidence of consciousness of guilt.” *Id.* These considerations are equally relevant to

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determining, for purposes of a motion to suppress, whether the defendant's expectation of privacy in stolen property is reasonable.

Here, the evidence that defendant could not identify who the seller was, did not have a receipt from the sale, and only paid \$10 or \$15 for the GPS tend to show that defendant knew or should have known that the GPS was stolen. On the other hand, that defendant did not flee from police and was cooperative is evidence that defendant did not have consciousness of guilt. *See id.* We also note that there was no evidence presented as to the value of the GPS or whether sales of that type were a typical transaction occurring at the location where defendant alleged he bought the GPS. These are all considerations that the trial court, and not this Court, must weigh in the first instance.

Defendant, citing *State v. Larocco*, 794 P.2d 460 (Utah 1990) and *McFerguson*, argues that he has standing to contest the legality of the search because (1) defendant claimed that he owned the GPS and (2) the question whether defendant stole the GPS, as opposed to purchasing it, was an issue for trial. In *Larocco*, the Supreme Court of Utah held that the defendant had standing to challenge the search of a vehicle that he was subsequently charged with stealing. *Id.* at 464. The court distinguished other cases in which the courts held the defendant lacked standing to challenge the search of stolen property on the grounds that in those cases, "it was clearly established and not disputed prior to the search that the defendant did not own or did not have an interest in the property searched" and held that "[w]here a defendant has not declared beforehand that he has no interest in the vehicle and where proof that the car was stolen is an issue at trial, . . . the defendant has standing to challenge the legality of the search." *Id.*

Defendant argues, relying on *McFerguson*, that the State's assertion, in seeking reversal of the denial of the motion to suppress, that the GPS was stolen "assumes the very facts that were to be proved at trial If assuming those facts as given dictates whether he could move to suppress the evidence by which the government meant to prove his guilt, that would do away with the justification for suppression hearings in a great many cases[.]" *McFerguson*, 770 A.2d at 71.

The rule stated in *Larocco* is inconsistent with prior, controlling decisions of our courts. Our appellate courts have previously held that the question whether it is established prior to the search that the defendant did not own or have an interest in the property searched is relevant only to the state of mind of the officers conducting the search. *State v. Cooke*, 54 N.C. App. 33, 43, 282 S.E.2d 800, 807 (1981), *aff'd*, 306 N.C. 132, 291

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S.E.2d 618 (1982). However, “[t]he state of mind of the searcher regarding the possession or ownership of the item searched is irrelevant to the issue of standing [to assert Fourth Amendment rights]. Rather, standing to object is predicated on the objector alleging *and, if challenged, proving* he was the victim of an invasion of privacy.” *Id.* (emphasis added) (quoting *United States v. Canada*, 527 F.2d 1374, 1378 (9th Cir. 1975)).

Furthermore, our holding does not ask the trial court to assume the GPS was stolen, but rather, to weigh the evidence before it to determine whether the defendant has met his burden of showing that he has a legitimate expectation of privacy in the digital contents of the GPS. In this case, in deciding solely for purposes of the motion to suppress whether defendant had a legitimate expectation of privacy in the GPS, it was the trial court’s duty to determine the credibility of defendant’s testimony that he bought the GPS and reasonably believed it was not stolen. See *State v. Villeda*, 165 N.C. App. 431, 438, 599 S.E.2d 62, 66 (2004) (“[T]he trial court, as the finder of fact, has the duty to pass upon the credibility of the evidence and to decide what weight to assign to it and which reasonable inferences to draw therefrom[.]”).

Indeed, in *Greenwood*, our Supreme Court addressed a case materially indistinguishable from this one. In *Greenwood*, 301 N.C. at 706, 273 S.E.2d at 439, an officer searched a car as a search incident to arrest and found a pocketbook under some jackets on the back seat of the car. The officer searched the pocketbook and discovered from its contents that it did not belong to the defendant, but rather belonged to a woman whose motor vehicle had been broken into. *Id.*, 273 S.E.2d at 439-40. The defendant was then charged with breaking and entering the victim’s motor vehicle and larceny of her pocketbook. *Id.*, 273 S.E.2d at 440. The Supreme Court reversed this Court’s opinion holding that the defendant’s motion to suppress should have been allowed as to the contents of the pocketbook. *Id.* at 707, 273 S.E.2d at 440.

After noting that it was “apparent from the face of the record that the pocketbook in question was not the property of the defendant[.]” the Court then pointed out that “[d]efendant offered no evidence to show any legitimate property or possessory interest in the pocketbook, and we conclude that he had none.” *Id.* The Court, therefore, held “that *defendant failed to show* that the seizure and search of the pocketbook infringed upon his own personal rights under the Fourth Amendment. Therefore, defendant’s motion to suppress the pocketbook and its contents was properly denied by the trial court. [The d]ecision of the Court of Appeals to the contrary is erroneous and must be reversed.” *Id.* at 708, 273 S.E.2d at 441 (emphasis added).

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Under *Greenwood*, defendant, in this case, has the burden of showing, for purposes of the motion to suppress, that the search of the GPS infringed on his Fourth Amendment rights because he had a reasonable expectation of privacy in the digital contents of the GPS. The trial court, before granting the motion to suppress, was required to make sufficient findings of fact, based on the evidence, to establish that defendant had the necessary reasonable expectation of privacy. Because the trial court failed to do so, we reverse and remand for a factual determination whether defendant knew the GPS was stolen and whether he acquired it innocently, as he asserted at the suppression hearing.

REVERSED AND REMANDED.

Judges STEELMAN and McCULLOUGH concur.

STATE OF NORTH CAROLINA

v.

ROBERT STEVEN DOISEY

No. COA14-960

Filed 7 April 2015

1. Appeal and Error—argument abandoned—dismissed

The Court of Appeals dismissed defendant's argument based on N.C.G.S. § 15A-269(f) that the trial court erred by failing to order preparation of an inventory of biological evidence. Because defendant abandoned his argument that the trial court erred by denying his motion for appropriate relief requesting post-conviction DNA testing, he abandoned any argument under section 15A-269(f).

2. Appeal and Error—no ruling by trial court—dismissed

The Court of Appeals dismissed defendant's argument based on N.C.G.S. § 15A-268 that the trial court erred by failing to order preparation of an inventory of biological evidence. Because defendant did not make a written request pursuant to the statute, the trial court did not rule on such a request and it was not properly before the Court of Appeals.

On *certiorari* review of an order entered 13 August 2013 by Judge Phyllis Gorham in Halifax County Superior Court. Heard in the Court of Appeals 5 February 2015.

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Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Kimberly P. Hoppin for Defendant.

STEPHENS, Judge.

Factual and Procedural Background

Defendant Robert Steven Doisey appeals from the denial of his “Motion to Locate and Preserve Evidence” and “Motion for Post-Conviction DNA Testing.” We dismiss.

In April 1997, a jury convicted Defendant of two counts of first-degree statutory sex offense, and the trial court sentenced Defendant to 339-416 months in prison. The charges against Defendant arose from his statutory rape of D.H.,¹ the then-12-year-old daughter of Defendant’s girlfriend. Defendant appealed from the judgment entered upon his convictions. *See State v. Doisey*, 138 N.C. App. 620, 532 S.E.2d 240, *disc. review denied*, 352 N.C. 678, 545 S.E.2d 434 (2000), *cert. denied*, 531 U.S. 1177, 148 L. Ed. 2d 1015 (2001). While that appeal was pending, Defendant filed a motion for appropriate relief (“MAR”) in the trial court, alleging that D.H. had recanted her trial testimony. *Id.* at 623, 532 S.E.2d at 243. This Court accordingly remanded the matter to the trial court, which held a hearing in July 1998. *Id.* At that hearing, D.H. recanted her trial testimony. *Id.* At the close of the first hearing, Judge Louis B. Meyer took the matter under advisement. *Id.* Subsequently, Judge Meyer became seriously ill and was unable to rule on Defendant’s MAR. *Id.* The matter was reassigned to Judge Thomas D. Haigwood, who held a second hearing in December 1999. *Id.* At the second hearing, D.H. recanted her recantation, stating that her trial testimony had been accurate. *Id.* at 624, 532 S.E.2d at 243. The trial court denied Defendant’s MAR. *Id.* Defendant appealed from the denial of his MAR, and this Court considered that ruling along with Defendant’s arguments on direct appeal. *Id.* at 624-25, 532 S.E.2d at 243-44.

In its opinion, this Court found that certain evidence was improperly admitted at Defendant’s trial, but the admission of that evidence did not constitute plain error. *Id.* at 627, 532 S.E.2d at 245. This Court also determined that the trial court did not abuse its discretion in concluding that it was “not well satisfied that the testimony of [D.H.] given at trial

1. We use initials to protect the identity of the juvenile victim.

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was false,” and thus, did not err in denying Defendant’s MAR. *Id.* at 628, 532 S.E.2d at 245-46.

In 2001 and 2002, Defendant filed *pro se* MARs based on changes in the law regarding expert testimony on sexual abuse and requesting post-conviction DNA testing. Each MAR was summarily denied. In 2002, this Court denied Defendant’s petitions for *certiorari* review of the denial of his MARs. Subsequent MARs in 2004 and 2006 were also denied in the trial court. The appeal now before this Court arises from *pro se* motions to locate and preserve evidence and for post-conviction DNA testing which Defendant filed on 17 September 2012. The trial court summarily denied both motions by order entered 13 August 2013. Defendant gave timely written notice of appeal and requested assignment of appellate counsel. However, Defendant did not timely perfect his appeal.

On 10 April 2014, through appointed counsel, Defendant filed a petition for writ of *certiorari* in this Court for review of the trial court’s denial of “the Order Denying Post-Conviction DNA Testing entered . . . August 13, 2013.”² By order entered 23 April 2014, this Court issued a writ of *certiorari* to review that order.

However, Defendant does not bring forward on appeal any argument that the trial court erred in denying his motion for DNA testing. Where a party makes no argument in his brief concerning a particular issue, it is deemed abandoned. *See* N.C.R. App. P. 28(b)(6). Thus, Defendant has abandoned any arguments that the trial court erred in denying his request for DNA testing, and we do not consider the merits of that ruling.

Discussion

Defendant argues only that the trial court erred in failing to order preparation of an inventory of biological evidence. In support of his contention, Defendant relies on N.C. Gen. Stat. §§ 15A-268(a7) and 15A-269(f), two related, but distinct provisions of our State’s DNA Database and Databank Act of 1993 (“the Act”). *See* N.C. Gen. Stat. § 15A-266 *et seq.* (2013).

On 17 November 2014, the State filed a motion to dismiss Defendant’s appeal. By order filed 4 December 2014, the State’s motion to dismiss

2. Defendant’s petition did not explicitly reference his motion to locate and preserve, but that document was included as an attachment. In addition, the 23 April 2014 order this Court issued allowing Defendant’s petition for a writ of *certiorari* provides for “review [of] the order entered on 13 August 2013” without limiting the scope of that review to the denial of the motion for DNA testing. Accordingly, herein we address Defendant’s argument regarding the trial court’s denial of his motion to locate and preserve evidence.

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was referred to this panel. In its motion, the State contends that Defendant has no right to appeal any issue related to his most recent *pro se* motions under either section 15A-268(a7) or 15A-269(f). We agree that Defendant's arguments must be dismissed, but for reasons other than those argued by the State.

Section 15A-269(f)

[1] We first consider Defendant's claim under section 15A-269, arguably the centerpiece of the Act, which in pertinent part states:

(a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing and, if testing complies with FBI requirements and the data meets NDIS criteria, profiles obtained from the testing shall be searched and/or uploaded to CODIS³ if the biological evidence meets all of the following conditions:

- (1) Is material to the defendant's defense.
- (2) Is related to the investigation or prosecution that resulted in the judgment.
- (3) Meets either of the following conditions:
 - a. It was not DNA tested previously.
 - b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

....

(f) *Upon receipt of a motion for post[-] conviction DNA testing, the custodial agency shall inventory the evidence pertaining to that case and provide the inventory list, as*

3. "CODIS is the acronym for the 'Combined DNA Index System' and is the generic term used to describe the FBI's program of support for criminal justice DNA databases as well as the software used to run these databases. The National DNA Index System or NDIS is considered one part of CODIS, the national level, containing the DNA profiles contributed by federal, state, and local participating forensic laboratories." See Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited 16 March 2015).

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well as any documents, notes, logs, or reports relating to the items of physical evidence, to the prosecution, the petitioner, and the court.

....

N.C. Gen. Stat. § 15A-269 (2013) (emphasis added).

The stated policy behind the Act is “to assist federal, State, and local criminal justice and law enforcement agencies in the identification, detection, or exclusion of individuals who are subjects of the investigation or prosecution of felonies or violent crimes against the person. . . .”

N.C. Gen. Stat. § 15A-266.1 (2013). Thus, in applying the Act in any particular case, we must strive to harmonize its provisions while being mindful of this legislative intent and seeking to avoid nonsensical interpretations. *See State v. Harvey*, 281 N.C. 1, 19-20, 187 S.E.2d 706, 718 (1972) (“In seeking to discover and give effect to the legislative intent, an act must be considered as a whole, and none of its provisions shall be deemed useless or redundant if they can reasonably be considered as adding something to the act which is in harmony with its purpose.”) (citations omitted). Both the plain language of section 15A-269 as quoted *supra*, and the express intent of the Act as stated in section 15A-266.1, make absolutely clear that its ultimate focus is to help solve crimes through DNA *testing*. All provisions of the Act must be understood as facilitating that ultimate goal.

Against this backdrop, we begin by addressing the State’s assertion that we should dismiss this appeal because Defendant made no request for an inventory of biological evidence under section 15A-269(f). This contention ignores the plain language of section 15A-269(f) which states that a request for post-conviction DNA testing triggers an obligation for the custodial agency to inventory relevant biological evidence: “*Upon receipt of a motion for post[-]conviction DNA testing, the custodial agency shall inventory the evidence pertaining to that case and provide the inventory list, as well as any documents, notes, logs, or reports relating to the items of physical evidence, to the prosecution, the petitioner, and the court.*” N.C. Gen. Stat. § 15A-269(f) (emphasis added). Thus, a defendant who requests DNA testing under section 15A-269 need not make any additional written request for an inventory of biological evidence.

Here, it is undisputed that Defendant moved for post-conviction DNA testing. That motion triggered a requirement to “inventory the [biological] evidence pertaining to that case and provide the inventory list . . . to the prosecution, the petitioner, and the court.” *Id.* Further, the Act explicitly provides that a “defendant may appeal an order denying

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the defendant's motion for DNA testing" N.C. Gen. Stat. § 15A-270.1 (2013). Therefore, had Defendant brought forward an argument on appeal that the trial court erred in denying his motion for DNA testing, we could have possibly considered, in conjunction therewith, any failure of the relevant custodial agency to conduct an inventory of biological evidence as required in section 15A-269(f).

However, as noted *supra*, despite requesting and being granted the right to *certiorari* review, Defendant has not brought forward any argument that the trial court erred in denying his motion for DNA testing.⁴ Accordingly, there is no longer any request for DNA testing under section 15A-269 at issue in Defendant's case. As such, Defendant's motion for an inventory of biological evidence likewise cannot proceed under that section. Simply put, the required inventory under section 15A-269 is merely an ancillary procedure to an underlying request for DNA testing. Since Defendant has abandoned his right to appellate review of the denial of his request for DNA testing, there is no need for the inventory required by section 15A-269(f). To hold otherwise would be "useless" and not "in harmony with [the Act's] purpose." See *Harvey*, 281 N.C. at 20, 187 S.E.2d at 718. Accordingly, we dismiss Defendant's argument that the trial court erred in failing to order an inventory of biological evidence as provided for under section 15A-269.

Section 15A-268

[2] Defendant also argues that the trial court erred in failing to order preparation of an inventory of biological evidence under section 15A-268 of the Act. Section 15A-268 is entitled "Preservation of biological evidence" and requires the preservation of "any physical evidence, regardless of the date of collection, that is reasonably likely to contain any biological evidence collected in the course of a criminal investigation or prosecution." N.C. Gen. Stat. § 15A-268(a1) (2013). The statute also provides that,

4. Defendant may have elected not to make such an argument because, in order to obtain DNA testing under the Act, "[t]he burden is on [the] defendant to make the materiality showing required in N.C. Gen. Stat. § 15A-269(a)(1)." *State v. Foster*, __ N.C. App. __, __, 729 S.E.2d 116, 120 (2012). In *Foster*, the defendant made only a conclusory statement that "[t]he ability to conduct the requested DNA testing is material to the [d]efendant's defense . . . [and] provided no other explanation of why DNA testing would be material to his defense." *Id.* This Court held that, because the "defendant failed to establish the condition precedent to the trial court's granting his motion, the trial court properly denied the motion." *Id.* Similarly, here, Defendant's motion for DNA testing alleges only that "the [r]equested DNA testing is material to" Defendant's defense.

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[u]pon *written request* by the defendant, the custodial agency shall prepare an inventory of biological evidence relevant to the defendant's case that is in the custodial agency's custody. If the evidence was destroyed through court order or other written directive, the custodial agency shall provide the defendant with a copy of the court order or written directive.

N.C. Gen. Stat. § 15A-268(a7) (emphasis added).⁵

The wording and provisions which our General Assembly chose to include in the Act reflect an important difference between sections 15A-269 and 15A-268 with regard to the preparation of an inventory of biological evidence. As noted *supra*, under the former, a request for DNA testing triggers an automatic requirement for the custodial agency to prepare an inventory, with no further request or action by a defendant needed. Under the latter, the custodial agency is always required to preserve biological evidence under the terms of the section. However, the plain language of subsection 15A-268(a7) requires that a defendant who wishes to go further and have an inventory of such evidence prepared must make that request in writing.

Here, Defendant never made any written request for an inventory of biological evidence relevant to his case. Rather, in his written motion under section 15A-268, he sought only that certain “physical evidence obtained during the investigation of his criminal case *be located and preserved*.” (Emphasis added). Defendant then specified the biological evidence that he wanted to have located and preserved: “a rape kit-sexual assault kit, containing vaginal, anal, and oral swabs and smears from the alleged victim.”⁶ After alleging his innocence and recounting factual and procedural aspects of his case, Defendant concluded by again requesting “the court to order the location *and preservation of the above evidence* so that DNA testing can be conducted pursuant to [sections] 15A-269

5. We note that the showing required to trigger an inventory per written request under this section of the Act is that evidence be “relevant to the defendant's case[.]” *Id.* We express no opinion as to whether this standard differs from the materiality showing required under section 15A-269 or whether either section of the Act might permit a defendant to request an inventory of biological evidence where he argues that such information is necessary for him to determine and then establish before a court its materiality so as to entitle him to DNA testing. Those issues are not before the Court in this case.

6. Defendant refers to the same evidence in identical terms in his motion for DNA testing.

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and 15A-270.”⁷ Defendant’s failure to request any inventory of biological evidence relevant to his case is not surprising as he was fully aware of the identity of the evidence the testing of which he believed was material to his claim of innocence, to wit, the sexual assault kit.

Because Defendant did not make any written request for an inventory under section 15A-268(a7), it follows that the trial court did not consider or rule on such a request. Thus, there is no ruling under section 15A-268(a7) for this Court to review. Accordingly, we agree with the State that Defendant’s appellate argument under this section of the Act is not properly before this Court.

DISMISSED.

Judges GEER and DILLON concur.

STATE OF NORTH CAROLINA

v.

DARIO FIZOVIC, DEFENDANT

No. COA14-723

Filed 7 April 2015

1. Search and Seizure—open container offense—search incident to citation

In defendant’s appeal of the trial court’s order denying his motion to suppress, the Court of Appeals rejected his argument that the search of his vehicle’s center console was an impermissible search incident to citation. Defendant never was issued a citation, and he was arrested for the open container offenses for which he was stopped.

2. Search and Seizure—open container offense—search incident to arrest—before arrest

In defendant’s appeal of the trial court’s order denying his motion to suppress, the Court of Appeals rejected his argument that the search of his vehicle’s console should be treated as a search incident

7. Section 15A-270 governs procedures following DNA testing under section 15A-269 and requires, as an initial step, “a hearing to evaluate the results and to determine if the results are unfavorable or favorable to the defendant.” N.C. Gen. Stat. § 15A-270(a) (2013).

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to citation because the officer only intended to give him a citation and he had not yet been arrested. At the time of the search, the officer had probable cause to arrest defendant for open container violations, which allowed the search to be justified as incident to arrest.

3. Search and Seizure—open container offense—search for additional evidence related to violations

In defendant's appeal of the trial court's order denying his motion to suppress, the Court of Appeals rejected his argument that the search of his vehicle's center console was not justified as a search incident to arrest. Even though the officer had enough evidence to prosecute defendant for open container violations, he had a reasonable belief that evidence related to the violations might be found in defendant's center console.

Appeal by defendant from order entered 22 January 2014 by Judge Susan E. Bray and judgment entered 20 March 2014 by Judge Edgar B. Gregory in Guilford County Superior Court. Heard in the Court of Appeals 6 November 2014.

Attorney General Roy Cooper, by Associate Attorney General Laura Askins, for the State.

Willis Johnson & Nelson PLLC, by Drew Nelson, for defendant-appellant.

GEER, Judge.

Defendant Dario Fizovic appeals from a judgment entered on his *Alford* plea of guilty to possession of a firearm by a felon. On appeal, defendant contends that the trial court erred in denying his motion to suppress evidence seized from defendant's vehicle after he was stopped for having an open container of alcohol in his vehicle. Defendant first argues that the search amounted to a "search incident to citation" and was invalid pursuant to *Knowles v. Iowa*, 525 U.S. 113, 142 L. Ed. 2d 492, 119 S. Ct. 484 (1998), and *State v. Fisher*, 141 N.C. App. 448, 539 S.E.2d 677 (2000). However, because defendant was never issued a citation and was in fact arrested for the open container offense, *Knowles* and *Fisher* are inapplicable.

Alternatively, defendant argues that the search cannot be justified as a search incident to arrest because at the time of the search, the officer had already obtained sufficient evidence to prosecute the open container

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offense. Defendant misstates the standard. An officer may conduct a warrantless search of a suspect's vehicle incident to his arrest if he has a reasonable belief that evidence related to the offense of arrest may be found inside the vehicle. The trial court's unchallenged findings of fact (1) that it is common to find alcohol in vehicles of individuals who are stopped for alcohol violations and (2) that the center console in defendant's car was large enough to hold beer cans support the conclusion that the arresting officer had a reasonable belief that evidence related to the open container violation might be found in defendant's vehicle. Accordingly, we hold that the trial court properly concluded that the search was a valid search incident to defendant's arrest, and we affirm.

Facts

The trial court made the following undisputed findings of fact in its order denying defendant's motion to suppress. On 14 March 2012, Officer Billy Wyatt of Lankford Company Police was patrolling the Davie Street Parking Deck in Greensboro, North Carolina. Around 11:50 p.m., Officer Wyatt observed defendant driving a Jeep Grand Cherokee up the ramp in his direction. Officer Wyatt saw a passenger in the front seat and observed defendant raise a can of Modelo beer to his mouth and consume alcohol. He stopped defendant's vehicle and asked defendant for his driver's license. Defendant gave Officer Wyatt a resident alien card. Officer Wyatt asked again for a driver's license. Defendant told Officer Wyatt that his license was in the center console and started to reach for it. For officer safety reasons, Officer Wyatt stopped defendant and asked him to step out of the vehicle.

By this time, Officer Neff of Lankford Company Police and Officer Shaffer of the Greensboro Police Department had arrived to provide assistance. While Officer Neff got the passenger out of the car, Officer Wyatt patted defendant down for weapons and asked him if he had any drugs or weapons in the car. Defendant replied that he did not.

Officers Wyatt and Shafer then searched the center console for defendant's driver's license and for additional alcohol or alcohol containers. When Officer Shaffer lifted up the inner console, he found a loaded .357 Taurus revolver. The officers did not find a driver's license in the outer compartment of the console or in the inner console. When Officer Wyatt asked defendant why he did not tell him there was a weapon in the vehicle, defendant replied that it was because he was a convicted felon. Officer Wyatt then arrested defendant for possession of a firearm by a felon and for the open container violation.

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The following day, a magistrate determined that there was probable cause to arrest defendant for both charges, and defendant was released on bond. On 23 April 2012, the trial court dismissed the open container violation, and on 21 May 2012, defendant was indicted for possession of a firearm by a felon. On 17 January 2014, defendant filed a motion to suppress the evidence obtained as a result of the search of his vehicle and his motion was heard before Judge Susan E. Bray on 21 January 2014.

In an order entered 22 January 2014, Judge Bray concluded based on her findings of fact that “Officer Wyatt had probable cause to arrest Defendant Fizovic for driving while consuming alcohol and/or open container” at the beginning of the stop and that Officer Wyatt had a reasonable belief that evidence relevant to the open container violation might be found in defendant’s vehicle. Judge Bray therefore concluded that the search was a lawful search incident to defendant’s arrest and denied defendant’s motion to suppress.

On 10 March 2014, defendant entered an *Alford* plea of guilty to possession of a firearm by a felon. Judge Edgar B. Gregory sentenced defendant to a presumptive-range term of 12 to 24 months imprisonment, suspended the sentence, and placed defendant on supervised probation for 18 months. Defendant timely appealed to this Court.¹

Discussion

Our review of a trial court’s denial of a motion to suppress is “strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Unchallenged findings of fact are binding on appeal. *State v. Lupek*, 214 N.C. App. 146, 150, 712 S.E.2d 915, 918 (2011). The trial court’s conclusions of law are, however, fully reviewable and “must be legally correct, reflecting a correct application of applicable legal principles to the facts found.” *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997).

1. Defendant additionally filed a petition for writ of certiorari seeking review of the suppression order in the event this Court were to determine that his notice of appeal was inadequate. Because we have determined that defendant preserved his right to appeal the order denying his motion to suppress and provided proper oral notice of appeal from the judgment entered on his *Alford* guilty plea, we dismiss defendant’s petition for writ of certiorari as moot.

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On appeal, defendant does not challenge the trial court's factual findings, but contends that the trial court erred in concluding that the warrantless search of defendant's vehicle was justified as a search incident to arrest. We disagree.

Generally, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585, 88 S. Ct. 507, 514 (1967) (internal footnote omitted). One such exception is a search incident to a lawful arrest. Pursuant to this exception, the police may "search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Arizona v. Gant*, 556 U.S. 332, 351, 173 L. Ed. 2d 485, 501, 129 S. Ct. 1710, 1723 (2009).

[1] Defendant, citing *Knowles* and *Fisher*, argues first that the search in this case was not a search incident to arrest, but rather a "search incident to citation." Pursuant to *Knowles* and *Fisher*, when a citation is issued for a traffic offense, and a search of the vehicle will not yield any additional evidence of that offense, a warrantless search of the vehicle is unconstitutional. In *Knowles*, the United States Supreme Court held that a search of the defendant's vehicle after he had been issued a citation for speeding violated the Fourth Amendment because neither of the historic rationales for a search incident to arrest – the concern for officer safety and the destruction or loss of evidence – was present. Specifically with respect to the loss of evidence rationale, the Court reasoned that "[n]o further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car." 525 U.S. at 118, 142 L. Ed. 2d. at 499, 119 S. Ct. at 488.

In *Fisher*, the police stopped the defendant's vehicle and issued a citation for defendant's driving while his license was revoked. 141 N.C. App. at 450, 539 S.E.2d at 679. While one officer took defendant to his patrol car to issue the citation, a canine unit arrived to sniff the vehicle and "alerted" to the presence of drugs. *Id.*, 539 S.E.2d at 679-80. The officers found marijuana in the hood of the vehicle and arrested defendant on several drug charges. *Id.* at 450, 451, 539 S.E.2d at 680. On appeal, this Court determined that there was not competent evidence to support the trial court's finding that defendant had been *arrested* for the offense of driving with a revoked license. *Id.* at 454, 539 S.E.2d at 682. It then

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concluded that “[b]ecause defendant was never arrested, the search of his vehicle was not justified as a search incident to a lawful arrest. Furthermore, in accordance with *Knowles*, the officers were not justified in searching defendant’s car based upon the issuance of the citation. This is true even though the officers may have had probable cause to arrest defendant.” *Id.* at 456, 539 S.E.2d at 683.

Here, unlike in *Knowles* and *Fisher*, defendant was not issued a citation, but was in fact arrested for the open container violation. Defendant cites no authority, and we have found none, suggesting that *Knowles* and *Fisher* apply where no citation is issued. We, therefore, hold that *Knowles* and *Fisher* are inapplicable to this case. See *Virginia v. Moore*, 553 U.S. 164, 177, 170 L. Ed. 2d 559, 571, 128 S. Ct. 1598, 1608 (2008) (holding *Knowles* did not control where officers arrested the defendant instead of issuing him a citation).

[2] Defendant argues, nonetheless, that we should treat the search as one incident to citation because Officer Wyatt testified that he originally intended only to issue defendant a citation, and at the time of the search, defendant had not yet been arrested. However, in certain circumstances, the search incident to arrest exception may apply to a search conducted prior to arrest. As explained in *State v. Wooten*, 34 N.C. App. 85, 89-90, 237 S.E.2d 301, 305 (1977):

[W]here a search of a suspect’s person occurs before instead of after formal arrest, such search can be equally justified as “incident to the arrest” provided probable cause to arrest existed prior to the search and it is clear that the evidence seized was in no way necessary to establish the probable cause. If an officer has probable cause to arrest a suspect and as incident to that arrest would be entitled to make a reasonable search of his person, we see no value in a rule which invalidates the search merely because it precedes actual arrest. The justification for the search incident to arrest is the need for immediate action to protect the arresting officer from the use of weapons and to prevent destruction of evidence of the crime. These considerations are rendered no less important by the postponement of the arrest.

Here, although defendant was not formally arrested until after the search, defendant does not challenge the trial court’s determination that Officer Wyatt had probable cause to arrest defendant for driving while consuming alcohol and open container violations at the beginning of

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the stop. Defendant cites no authority, and we have found none, holding that the officer's initial intent to issue a citation rather than arrest the defendant is relevant to the validity of the search. Accordingly, we hold that pursuant to *Wooten*, the search may still be justified as incident to arrest, even though the arrest occurred after the search. *See United States v. Nash*, 100 A.3d 157, 168 (D.C. 2014) (holding where officer had probable cause to believe that the defendant had committed offense of possession of open container of alcohol, search incident to arrest exception applied even though at time of search officers had not yet arrested the defendant and did not intend to do so).

[3] Defendant next contends that even if the search could be considered under the search incident to arrest doctrine, it was not justified because Officer Wyatt had already obtained all the evidence necessary to prosecute the offense for which defendant was ultimately arrested. Defendant argues that this case is similar to *State v. Johnson*, 204 N.C. App. 259, 265-66, 693 S.E.2d 711, 716 (2010), where this Court held unconstitutional the search of the defendant's vehicle after he had been arrested for driving with a revoked license.

Defendant, however, misstates the standard for determining whether a search may be justified under the discovery-of-evidence prong of the search incident to arrest exception. The question is not whether the officer has obtained the evidence minimally necessary to convict the defendant of the offense, but rather, whether it is reasonable to believe that any evidence relevant to the crime will be found in the vehicle. *Gant*, 556 U.S. at 343, 173 L. Ed. 2d at 496, 129 S. Ct. at 1719.

For example, in *State v. Foy*, 208 N.C. App. 562, 563, 703 S.E.2d 741, 741 (2010), an officer discovered a revolver in the defendant's truck, arrested the defendant for carrying a concealed weapon, and then searched the truck. The State argued that the search was a valid search incident to arrest because "the discovery of one concealed weapon gave the officers reason to believe that further evidence of this crime, such as another concealed weapon, ammunition, a receipt, or a gun permit, could exist in the truck. Not only would the discovery of this evidence compound the crime, such evidence would be necessary and relevant to show ownership or possession, could serve to rebut any defenses offered by defendant at trial, and would aid the State in prosecuting the crime to its full potential." *Id.* at 565-66, 703 S.E.2d at 743. This Court found the State's reasoning to be consistent with *Gant*, and upheld the search because the officers had reason to believe that evidence relating to the charge of carrying a concealed weapon could be found in the truck. *Id.* at 566, 703 S.E.2d at 743.

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The offense of arrest in this case – an open container violation – is more similar to the offense in *Foy* than the offense in *Johnson*. In *Johnson*, the defendant was arrested for driving with a revoked license – an offense for which it is unreasonable to expect to find any related evidence. Here, in contrast, there may exist tangible evidence of a violation of open container laws – specifically, open containers of alcohol – that an officer may reasonably expect to find in a suspect’s vehicle. Furthermore, defendant does not dispute the trial court’s findings that the center console of his vehicle was large enough to hold beer cans and that it is common to find alcohol in the vehicles of drivers that are stopped for alcohol violations. These findings support the trial court’s determination that Officer Wyatt had a reasonable belief that evidence relevant to the open container violation might be found in defendant’s vehicle. Consequently, the search of the console was a valid search incident to arrest.

In conclusion, we hold that there is competent evidence to support the trial court’s findings of fact, and those findings support the trial court’s conclusion that the search of defendant’s vehicle was justified as a search incident to defendant’s arrest for an open container violation. The trial court, therefore, did not err in denying defendant’s motion to suppress.

AFFIRMED.

Judges STEELMAN and STEPHENS concur.

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[240 N.C. App. 456 (2015)]

STATE OF NORTH CAROLINA

v.

WILLIAM HENRY JAMES

No. COA14-753

Filed 7 April 2015

1. Appeal and Error—preservation of issues—failure to argue—drugs—motion to dismiss—sampling technique—sufficiency of sample size

The trial court did not err in a drugs case by denying defendant's motion to dismiss based on the State's flawed evidence regarding an agent's alleged improper sampling technique. The agent was not cross-examined by defense counsel regarding the sufficiency of the sample size, nor was the sufficiency of the sample size a basis for defendant's motion to dismiss. Further, the State presented sufficient evidence to conclude that defendant possessed and transported 28 grams or more of a Schedule II controlled substance.

2. Appeal and Error—preservation of issues—failure to argue at trial

The Court of Appeals declined to take judicial notice of both Version 4 and Version 7 of the SBI Laboratory testing protocols since they were never presented to the trial court.

On writ of certiorari by defendant from judgment entered 5 February 2014 by Judge Alma L. Hinton in Martin County Superior Court. Heard in the Court of Appeals 21 January 2015.

Roy Cooper, Attorney General, by Scott K. Beaver, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Benjamin Dowling-Sendor, Assistant Appellate Defender, for defendant-appellant.

STEELMAN, Judge.

Where defendant neither cross-examined the State's expert witness regarding the sufficiency of the sample size, nor made it a basis for his motion to dismiss at trial, defendant's argument is dismissed. We decline to take judicial notice of Version 4 and Version 7 of the SBI protocols, as they were never presented to the trial court.

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[240 N.C. App. 456 (2015)]

I. Factual and Procedural Background

On 4 June 2012, narcotics officers from Martin and Washington Counties used a confidential informant to arrange a purchase of oxycodone pills from William Henry James (defendant). Defendant was in the passenger seat of a red car at the scene of the arranged purchase. When the deputies and officers arrived, the red car drove off. During the ensuing pursuit, defendant threw pills and pill bottles out of the car. This was observed by law enforcement officers. Deputy Sawyer of the Washington County Sheriff's Office retrieved two pill bottles containing a number of pills and Agent Davis, Narcotics Agent with the Martin County Sheriff's Office, retrieved four whole pills and two pill halves lying in the grass next to the road. The pills and pill bottles were then given to Deputy Wynne of the Martin County Sheriff's Office.

After returning to the Martin County Sheriff's Office, Deputy Wynne placed the pill bottles into separate evidence bags. Wynne testified that the four whole pills and two pill halves were placed into the evidence bag containing the bottle with similarly marked pills. Sixty-five pills were sent to the State Bureau of Investigation Laboratory for analysis.

Agent Alicia Matkowsky, a forensic chemist with the SBI, performed a chemical analysis on one pill from each bottle and concluded that both pills contained oxycodone, a substance containing opiates. The total weight of the two pills tested was 0.99 gram. Agent Matkowsky visually inspected the other sixty-three pills and concluded that based on the physical characteristics with respect to shape, color, and imprint, the pills were "consistent with" oxycodone. The total weight of the sixty-five pills submitted was 31.79 grams.

On 28 January 2013, defendant was indicted for trafficking in opium by possession of 28 grams or more; trafficking in opium by transportation of 28 grams or more; and possession with intent to sell or deliver opium. On 5 February 2014, a jury found defendant guilty of all three charges. Defendant was sentenced to the statutorily mandated active sentence of 225 to 279 months imprisonment and a fine of \$500,000.

Defendant appeals.

II. Standard of Review

"This court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of

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the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial court." *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600, *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003).

III. Motion to Dismiss

[1] In his only argument, defendant contends that the trial court erred in denying his motion to dismiss because the State's evidence was flawed in that Agent Matkowsky's sampling technique was improper. We disagree.

The facts of *State v. Dobbs*, 208 N.C. App. 272, 702 S.E.2d 349 (2010), are substantially similar to the instant case. In *Dobbs*, defendant was indicted for possession with intent to manufacture, sell, or deliver a Schedule III controlled substance; the sale and delivery of a Schedule III controlled substance; and trafficking in opium or an opium derivative by sale or delivery. *Id.* at 273, 702 S.E.2d at 350. A jury found defendant guilty of all charges. *Id.* at 274, 792 S.E.2d at 350. At trial, Special Agent Amanda Aharon, a chemist for the SBI, testified as an expert witness regarding eight tablets that she received from the Brunswick County Sheriff's Department. *Id.* at 275, 702 S.E.2d at 351. The total weight of the tablets was 8.5 grams. *Id.* Agent Aharon testified that her visual observation of the tablets' coloration and markings, when compared to the pharmaceutical database, indicated the tablets were a combination of hydrocodone and acetaminophen. *Id.* Agent Aharon then conducted a chemical analysis of one tablet which tested positive for hydrocodone, an opium derivative. *Id.* On appeal, defendant argued that the trial court erred in denying his motion to dismiss because the chemical analysis of one tablet was insufficient evidence that he trafficked by sale or delivery of more than four grams and less than fourteen grams of Dihydrocodeinone. *Id.* at 274, 702 S.E.2d at 351. Because Agent Aharon

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was not cross-examined by defense counsel regarding the sufficiency of the sample size, nor was the sufficiency of the sample size a basis for defendant's motion to dismiss, this Court dismissed defendant's argument. *Id.* at 276, 702 S.E.2d at 352.

In the instant case, Agent Matkowsky testified as an expert witness and was accepted by the trial court as an expert witness, without objection from defendant. Defendant did not cross-examine Agent Matkowsky regarding the sufficiency of the sample size and did not make the sufficiency of the sample size a basis for his motion to dismiss. The issue of whether the two chemically analyzed pills established a sufficient basis to show that there were 28 grams or more under N.C. Gen. Stat. § 90-95(h)(4) is not properly before this Court.

Defendant's argument is dismissed.

Even assuming *arguendo* that the issue was properly preserved for appeal, "[a] chemical analysis is required . . . , but its scope may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration." *State v. Ward*, 364 N.C. 133, 148, 694 S.E.2d 738, 747 (2010). Every pill need not be chemically analyzed, however. *Id.* In *State v. Meyers*, 61 N.C. App. 554, 556, 301 S.E.2d 401, 402 (1983), *cert. denied*, 311 N.C. 767, 321 S.E.2d 153 (1984), it was held that a chemical analysis of twenty tablets selected at random, "coupled with a visual inspection of the remaining pills for consistency, was sufficient to support a conviction for trafficking in 10,000 or more tablets of methaqualone." *Dobbs*, 208 N.C. App. at 276, 702 S.E.2d at 352.

In the instant case, one pill, physically consistent with the other pills, was chosen at random from each exhibit and tested positive for oxycodone. Agent Matkowsky testified that she visually inspected the remaining, untested pills and concluded that with regard to color, shape, and imprint, they were "consistent with" those pills that tested positive for oxycodone. The total weight of the pills was 31.79 grams, exceeding the 28 gram requirement for trafficking. As a result, the State presented sufficient evidence to conclude that defendant possessed and transported 28 grams or more of a Schedule II controlled substance. *See* N.C. Gen. Stat. § 90-90 (2013).

IV. Judicial Notice

[2] Defendant requests that this Court take judicial notice of both Version 4 and Version 7 of the SBI Laboratory testing protocols. We decline to do so.

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In *State v. Williams*, 207 N.C. App. 499, 505 700 S.E.2d 774, 778 (2010), defendant requested that judicial notice be taken of the North Carolina Department of Correction Policies—Procedures, No. VII.F Sex Offender Management Interim Policy 2007. This Court declined, noting that defendant did not specifically mention the policy before the trial court; the policy was not included in the record for appeal, but was rather appended to defendant’s brief; and that taking judicial notice of the policy would introduce “information which has not been subjected to adversarial testing in the trial courts.” *Id.*, at 505–06, 700 S.E.2d at 778 (quoting *State v. Vogt*, 200 N.C. App. 664, 669, 685 S.E.2d 23 (2009), *aff’d* 364 N.C. 425 (2010)). In *Johnson v. Johnson*, ___ N.C. App. ___, 750 S.E.2d 25, 29 (2013), the trial court declined to take judicial notice of Internet websites used to calculate the amount of defendant’s pension where that information was not offered as evidence before the trial court. This Court held that a “flaw cannot be corrected with a post-trial memorandum that relies upon Internet websites and other materials not before the trial court as competent, admitted evidence.” *Id.* at ___, 750 S.E.2d at 31.

In the instant case, both Version 4 and Version 7 of the SBI protocols are found on the North Carolina State Crime Laboratory’s website. Defendant did not present either version to the trial court, but seeks to have them considered for the first time on appeal by appending them to his brief. The State did not have an opportunity to test the veracity of the protocols at trial.

Version 4 of the SBI protocols had an effective date of 8 March 2013. Agent Matkowsky completed her chemical analysis on 8 October 2013. Defendant has presented no information that would show that Version 4 was the controlling version of the protocols on the date of Agent Matkowsky’s chemical analysis. In fact, between Version 4 and the date of Agent Matkowsky’s chemical analysis, Version 5 went into effect with an effective date of 10 May 2013. Version 5 of the SBI protocols does not appear in the record or defendant’s brief.

Version 7 of the SBI protocols had an effective date of 18 April 2014. Since Agent Matkowsky’s chemical analysis took place roughly six months prior to that date, Version 7 is wholly irrelevant.

DISMISSED.

Judges DIETZ and INMAN concur.

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[240 N.C. App. 461 (2015)]

STATE OF NORTH CAROLINA

v.

MARCUS LEE MOORE

No. COA14-665

Filed 7 April 2015

Probation and Parole—probation revocation hearing—held after probation ended—no subject matter jurisdiction

The Court of Appeals vacated the trial court's order revoking defendant's probation because the trial court lacked subject matter jurisdiction. Defendant's offenses were committed prior to 1 December 2009 and his probation revocation hearing was held after 1 December 2009, on 19 December 2013. There was no applicable tolling period, and the trial court's jurisdiction over defendant ended when his thirty-six month probationary period ended on or about 26 February 2012.

Appeal by defendant from judgments entered 19 December 2013 by Judge Marvin P. Pope in Buncombe County Superior Court. Heard in the Court of Appeals 19 November 2014.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Guy J. Loranger for defendant-appellant.

BRYANT, Judge.

Where defendant was not subject to a tolling period because his offenses were committed prior to 1 December 2009 and his probation revocation hearing was held after 1 December 2009, defendant's probationary period had expired and the trial court lacked jurisdiction to revoke defendant's probation.

On 17 February 2009, defendant Marcus Lee Moore was convicted in Rutherford County of one count of larceny from the person and sentenced to eight to ten months imprisonment. The trial court suspended defendant's sentence and ordered defendant to serve thirty-six months supervised probation. On 26 February 2009, defendant was convicted of fleeing/eluding arrest with a motor vehicle, possession of a stolen motor vehicle, and driving while license revoked. These charges were

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consolidated for judgment with the larceny charge from 17 February and defendant was sentenced to eight to ten months imprisonment. The trial court suspended defendant's sentence and ordered that he serve a sixty day active sentence and be placed on supervised probation for thirty-six months.

On 24 July 2009, violation reports were filed against defendant alleging that he had violated monetary conditions of his probation and had committed three new offenses on 29 March 2009. On 14 July 2010, the trial court found that defendant had committed the three new offenses, entered orders which modified the monetary conditions of defendant's probation, and transferred his supervision from Rutherford to Buncombe County. The trial court did not extend or otherwise alter defendant's probationary period.

On 4 March 2013, new violation reports were filed against defendant alleging numerous violations of his probation. Additional violation reports were filed against defendant on 20 June 2013. In a hearing on 19 December 2013, defendant admitted to willful violations of his probation. The trial court found that defendant had violated his probation. The trial court revoked defendant's probation and ordered defendant to serve eight to ten months imprisonment with credit for sixty days already served. Defendant appeals.

In his sole issue on appeal, defendant contends the trial court lacked subject matter jurisdiction to revoke his probation as his probationary period had expired and he was not subject to a tolling period. We agree.

This Court reviews *de novo* the issue of whether a trial court had subject matter jurisdiction to revoke a defendant's probation. *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citation omitted).

"A court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute." *State v. Burns*, 171 N.C. App. 759, 760, 615 S.E.2d 347, 348 (2005) (quoting *State v. Hicks*, 148 N.C. App. 203, 204, 557 S.E.2d 594, 595 (2001)). Pursuant to N.C. Gen. Stat. § 15A-1344,

[a]t any time prior to the expiration or termination of the probation period or in accordance with subsection (f) of this section, the court may after notice and hearing and for good cause shown extend the period of probation up

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to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. . . . If a probationer violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345 . . . may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing, if any

N.C.G.S. § 15A-1344(d) (2009). Prior to a 2009 amendment, a portion of subsection (d) read as follows: “The probation period shall be tolled if the probationer shall have pending against him criminal charges . . . which . . . could result in revocation proceedings against him for violation of the terms of this probation.” *Id.* However, other than as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant’s probation after the expiration of the probationary term. *State v. Camp*, 299 N.C. 524, 527, 263 S.E.2d 592, 594 (1980) (citations omitted). Pursuant to N.C.G.S. § 15A-1344(f), a trial court may extend, modify, or revoke a defendant’s probation after the expiration of the probationary term only if several conditions are met, including findings by the trial court that prior to the expiration of the probation period a probation violation had occurred *and* a written probation violation report had been filed. Also, the trial court must find good cause for the extension, modification, or revocation. N.C.G.S. § 15A-1344(f). As such, a defendant’s probation could be extended upon findings of specific actions that occurred prior to the end of a defendant’s probationary period. However, on this record there is no indication that N.C.G.S. § 15A-1344(f) is applicable. Indeed, the State’s argument as to jurisdiction is based solely on an application of the tolling provision. The tolling provision of N.C.G.S. § 15A-1344(d) was repealed in 2009, thus ending the tolling provision for defendants whose probation violation hearings were held after 1 December 2009. 2009 N.C. Sess. Laws ch. 372, § 20. Further, the tolling provision that was then moved to N.C.G.S. § 15A-1344(g) and allowed for a credit against a defendant’s probation if a pending criminal charge resulted in an acquittal or dismissal was then removed when subsection (g) was repealed. *See* 2011 N.C. Sess. Laws 84, 87, ch. 62, § 3. Therefore, because there was no applicable tolling period, the trial court had no jurisdiction to revoke defendant’s probation for offenses committed before 1 December 2009, when defendant’s probation revocation hearing was held after 1 December 2009. We hold that the trial court’s jurisdiction over defendant ended on or about 26 February 2012, thirty-six months after defendant was placed on probation on 26 February 2009.

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Our holding in this case, that the trial court lacked jurisdiction to revoke defendant's probation, is controlled by this Court's recent opinion in *State v. Sitosky*, ___ N.C. App. ___, 767 S.E.2d 623 (2014), *review and stay denied*, ___ N.C. ___, ___ S.E.2d ___ (March 5, 2015); *see also In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.”).

In *Sitosky*, the defendant was placed on probation in 2008 for offenses committed in 2007. In a probation violation hearing held in 2014, the defendant's probation was revoked for offenses committed since her probation began in 2008. This Court vacated and remanded finding that based on the 2009 North Carolina Session Law, a defendant “who committed her offenses . . . *prior to 1 December 2009* but had her revocation hearing *after 1 December 2009* was not covered by either statutory provision — § 15A-1344(d) or § 15A-1344(g) — authorizing the tolling of probation periods for pending criminal charges.” *Sitosky*, ___ N.C. App. at ___, 767 S.E.2d at 626.

In reviewing the record before this Court, it is clear that defendant committed his offenses on 17 and 26 February 2009, prior to 1 December 2009. Defendant's probation revocation hearing was held on 19 December 2013, almost five years after his thirty-six month probation order was entered on 26 February 2009, and well after 1 December 2009. As such, based on this Court's holding in *Sitosky*, the trial court lacked jurisdiction to revoke defendant's probation. Accordingly, the order of the trial court revoking defendant's probation must be vacated.

VACATED.

Judges DILLON and DIETZ concur.

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[240 N.C. App. 465 (2015)]

STATE OF NORTH CAROLINA

v.

CALVIN LEWIS MOORE, JR., DEFENDANT

No. COA14-1033

Filed 7 April 2015

Sexual Offenders—failure to register—failure to return verification form—motion to dismiss—insufficient evidence of receipt of verification form

The trial court erred by denying defendant's motion to dismiss for insufficient evidence that he actually received the verification form underlying his conviction of failure to register as a sex offender due to his failure to return the verification form. The judgments were vacated.

Appeal by Defendant from judgment entered 18 March 2014 by Judge Hugh B. Lewis in Cleveland County Superior Court. Heard in the Court of Appeals 3 February 2015.

Attorney General Roy Cooper, by Assistant Attorney General J. Joy Strickland, for the State.

M. Alexander Charns, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Calvin L. Moore, Jr. ("Defendant") appeals from judgments and commitments sentencing him to 127 to 165 months' imprisonment for failure to register as a sex offender under N.C. Gen. Stat. § 14-208.11 and, as a result, for attaining habitual felon status. Defendant contends that the trial court erred by denying his motion to dismiss for insufficient evidence that he actually received the verification form underlying his conviction of failure to register as a sex offender due to his failure to return the verification form. We agree and vacate the judgments.

I. Factual & Procedural History

Defendant was indicted on 12 August 2013. The indictment reads as follows:

The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county

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named above the defendant named above unlawfully, willfully and feloniously did

as a person required by Article 27A of Chapter 14 of the General Statutes of North Carolina to register as a sexual offender, knowingly and with the intent to violate the provisions of that article fail to register as a sexual offender in that the Defendant *failed to return his verification notice as required pursuant to N.C. Gen. Stat. § 14-208.9A.*

Defendant's trial began on 17 March 2014 in Cleveland County before the Honorable Hugh B. Lewis. The transcript and record reflect the following relevant facts.

On 7 March 2002, Defendant was convicted of indecent liberties with a child in Cleveland County. On 9 January 2003, Defendant first registered as a sex offender with the Cleveland County Sheriff's Office. Pursuant to the North Carolina Sex Offender Registration Act ("Act") at the time of the alleged offense, codified at N.C. Gen. Stat. § 14-208.5 *et seq.* N.C. Gen. Stat. § 14-208.19A:

(1) Every year on the anniversary of a person's initial registration date, and again six months after that date, the Division shall mail a nonforwardable verification form to the last reported address of the person.

(2) The person shall return the verification form in person to the sheriff within three business days after the receipt of the form.

....

(4) If the person fails to return the verification form in person to the sheriff within three business days *after receipt of the form*, the person is subject to the penalties provided in [N.C. Gen. Stat.] § 14-208.11. If the person fails to report in person and provide the written verification as provided by this section, the sheriff shall make a reasonable attempt to verify that the person is residing at the registered address[.]

N.C. Gen. Stat. § 14-208.9A(a) (2013) (emphasis added).

At trial, the State called Mike Proctor of the Cleveland County Sheriff's Office ("Deputy Proctor"). Deputy Proctor testified that he has overseen the sex offender registry in Cleveland County since August 2008 and explained the process of registering sex offenders as follows:

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During the initial registration we go through their duties as a registrant as provided by the Department of Justice, and that includes annual verification of information and after the first annual verification there's a law that the verification is every six months after if you're a regular offender, which [Defendant] is. The state's sexual offender coordination unit mails those letters from Raleigh on their anniversary date and six months thereafter, via certified mail, and the letter instructs the individual to report to the sheriff's office within three business days after receiving the letter.

The address verification sex offender ("AVSO") letter contains the "verification form" referenced in N.C. Gen. Stat. § 14-208.9A and "is mailed to the registrant's current registered address[.]" The procedure for sending the AVSO letter follows: "The SBI mails these out state-wide, in batch, on the Tuesday before the anniversary date or six months thereafter." That Tuesday, Deputy Proctor "receive[s] an electronic notification of whose letters have been mailed from Raleigh." Although the AVSO letter is "mailed by the state's sex offender coordination unit in Raleigh, the return address is to the local county sheriff's office because [they] maintain those records, and of course, the address to the registrant at their registered address." The sheriff's office receives what Deputy Proctor "call[s] the green receipt, which is the U.S. Post Office return receipt that the – whoever receives the letter signs, they date, and return to the sheriff's office." Deputy Proctor continued: "When the post office certifies that the letter has been delivered, that's the start of the three-day, the three business days[.]" Deputy Proctor confirmed that the AVSO letter was sent to Defendant's address in January 2012, July 2012, and January 2013 (this last address verification form contained Defendant's notice to the sheriff's office that he planned to enroll in Cleveland Community College as a full-time student), and that he had returned the verification form timely and properly.

Deputy Proctor further testified that on 9 July 2013, he received electronic notice that the SBI sent the AVSO letter to Defendant's last registered address. Shortly thereafter, Deputy Proctor received the AVSO letter's certified mailing receipt, which was signed by Carolyn Smith ("Smith") on 11 July 2013. On the mailing receipt, adjacent to Smith's signature, were two unchecked boxes: one for "addressee" and one for "agent." Also on the mailing receipt was an option that provided: "Restricted Delivery? (Extra Fee)," with an unmarked box adjacent to it, indicating that restricted delivery was not chosen by the

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sender. Deputy Proctor admitted that he was not familiar with Smith nor did he inquire into whom she was. On 19 July 2013, Deputy Proctor wrote a report informing his supervising lieutenant that Defendant had not returned the verification form within three business days. Deputy Proctor further admitted that he took no action to verify whether Defendant still resided at the same address except to call the county jail and confirm that Defendant was not incarcerated.

The State then called Deputy Proctor's supervisor, Richard Acuff of the Cleveland County Sheriff's Office's Criminal Investigation Division ("Lieutenant Acuff"). Lieutenant Acuff stated that when he reviewed Deputy Proctor's report on Defendant, he noted that the return receipt was signed by Smith on 11 July 2013 and concluded that Defendant's three-business-day window had closed on 16 July 2013. Lieutenant Acuff admitted that he was unfamiliar with Smith and that he took no action to inquire into her identity or to verify that Defendant still lived at the same address. On 19 July 2013, Lieutenant Acuff initiated proceedings against Defendant and secured a warrant for Defendant's arrest for "failure to supply us with his address." Defendant was arrested on 24 July 2013 and remained in custody until 5 August 2013. Lieutenant Acuff testified that, to his knowledge, no subsequent AVSO letter was mailed to Defendant. Three business days after being released from prison, on 8 August 2013, Defendant was charged again for failure to return the verification form. Lieutenant Acuff stated that the sheriff's office did not contact Defendant, nor did Defendant contact the sheriff's office, at any time after the alleged violation in July and before 23 October 2013, when Defendant presented to the sheriff's office and returned the verification form.

The State called David Bramlett of the Cleveland County Sheriff's Office ("Deputy Bramlett") last, who has worked in court security at the courthouse since 1996. Deputy Bramlett testified that, on 24 September 2013, he saw Defendant at the courthouse and arrested him upon discovering there was an outstanding order for his arrest that was issued on 8 August 2013 for Defendant's alleged violation of N.C. Gen. Stat. § 14-208.11.

At the close of the State's evidence, Defendant moved to dismiss the charges on grounds that the State presented insufficient evidence that he actually received the verification form. The trial court denied Defendant's motion, but dismissed the 8 August 2013 count for failure to return the verification form and its attached count of habitual felon status; the trial proceeded to Defendant's evidence.

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Defendant called his sister, Smith, to testify. Smith and Defendant have lived at the same address for approximately six years. Smith testified that for approximately the last four years, she has been out of work, receiving disability benefits, for health issues including: “[b]ipolar, schizophreni[a], COPD, . . . high blood pressure, high cholesterol, anxiety, you name it, just about, I got it.” Smith testified that she takes prescription medication including, *inter alia*, “Prozac, . . . haloperidol, . . . Xanax, . . . three blood pressure pills, . . . [and] clonidine[.]” Around the time of the incident, Smith lived with Defendant, her husband, her daughter, and her son. Smith stated that she typically receives the mail for the house and “sort[s] it and put[s] it on the arm of the living room couch.”

Smith testified that she did not remember receiving the AVSO letter or signing for it but readily admitted that it was her signature on the return receipt. Smith stated that she first learned about the AVSO letter when Defendant called her from jail. Once it came to her attention that the AVSO letter supposedly came to the house, Smith told Defendant “[she] didn’t remember it and [she] was sorry for what was going on, but . . . that [she] would look for it.” Smith searched the house unsuccessfully, and it wasn’t until months later that she eventually found the AVSO letter

when [she] was cleaning up the living room, because the room where [she] put[s] the mail, that’s not a room that people sit it. [sic] It’s just the very first room of the house with living room furniture, and no one sits there. There’s not a TV there or anything. And it was like [the AVSO letter] had fell over the arm of the couch; it was like sticking off down in the cushion.

Smith testified that she found the AVSO letter “sometime in October, because that’s when [she] usually do[es her] re-hanging of [her] curtains for the winter to make it warm.” She explained that “[w]hen [she] stepped up in the chair that’s when [she] could see that there was something in between there.” She continued:

When I stepped up in the chair . . . I saw that something was in there when my feet was in the chair, then I could see that there was something in between there. And when I looked down – I was hanging curtains, and when I looked down and I saw it, I just pulled it up and I was like, oh, my goodness. And I was like when did this come, and I just gave it to [Defendant] and he said, “That’s the letter that I was telling you about.”

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At the close of all the evidence, Defendant again moved to dismiss the charge for insufficient evidence. The trial court denied the motion and instructed the jury on the charge of Willfully Failing to Comply with Sex Offender Registration Law, pursuant to N.C.P.I. 207.75, as follows: “If you find from the evidence beyond a reasonable doubt that . . . Defendant, after receiving an address verification form, failed to verify and return the form in person within three business days of receiving it to the sheriff’s office listed on the address verification form, it would be your duty to return a verdict of guilty.” The trial court then instructed: “It is to be noted that the statute has no requirement of knowledge or intent so as to require that the State prove either that the Defendant knew he was in violation of or intended to violate the statute when he failed to return the form in person within three business days.”¹ After deliberations, the jury returned a verdict of guilty on 18 March 2014. Defendant consequently pled guilty to attaining habitual felon status. The trial court sentenced Defendant to 127 to 165 months’ imprisonment. Defendant appealed.

II. Analysis

Defendant contends that the trial court erred in denying his motion to dismiss, because the State failed to present sufficient evidence that Defendant actually received the verification form. We agree and, for the following reasons, vacate the lower court’s judgment.

This Court reviews a trial court’s denial of a motion to dismiss *de novo*, *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007), wherein this Court “considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation mark and citation omitted). Upon the defendant’s motion, this Court’s inquiry is “whether

1. As discussed hereinafter, the trial court may have been under an erroneous view of law existent at the time of trial. The trial judge cited to and quoted *State v. Young*, 140 N.C. App. 1, 8, 535 S.E.2d 380, 384 (2000), *disc. review improvidently allowed*, 354 N.C. 213, 552 S.E.2d 142 (2001), for the proposition that “the statute has no requirement of knowledge or intent, so as to require that the State prove either defendant knew he was in violation of or intended to violate the statute when he failed to register his change of address.” *Id.* As will be discussed below, this conclusion was based on an older version of the statute which had removed a previously-included *mens rea* requirement and, therefore, our Supreme Court had interpreted the amendment to mean that a violation of the statute was a strict liability offense. *See State v. Bryant*, 359 N.C. 554, 562, 614 S.E.2d 479, 484 (2005), *on remand*, 178 N.C. App. 742, 632 S.E.2d 599 (2006) (unpublished). The statute was amended in 2006 to provide that registrants who “willfully” failed to comply with sex offender laws on or after 1 December 2006 would be guilty of a Class F Felony. 2006 Sess. Laws 1065, 1070, 1085-86, Ch. 247 §§ 8(a), 22.

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there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). In making this determination, "all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (internal quotation marks omitted). "The defendant's evidence, unless favorable to the State, is not to be taken into consideration. However, if the defendant's evidence is consistent with the State's evidence, then the defendant's evidence may be used to explain or clarify that offered by the State." *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 627 (2011) (internal citation and quotation marks omitted).

Defendant was convicted of violating N.C. Gen. Stat. § 14-208.11, which provides in pertinent part: "A person required by this Article to register who willfully does any of the following is guilty of a Class F Felony: . . . (3) Fails to return a verification notice as required under [N.C. Gen. Stat.] § 14-208.9A." N.C. Gen. Stat. § 14-208.11(a)(3). Because N.C. Gen. Stat. §§ 14-208.9 and 14-208.11 " 'deal with the same subject matter, they must be construed in *pari materia* to give effect to each.' " *State v. Fox*, 216 N.C. App. 153, 156, 716 S.E.2d 261, 264 (2011) (quoting *State v. Holmes*, 149 N.C. App. 572, 576, 562 S.E.2d 26, 30 (2002)). N.C. Gen. Stat. § 14-208.9A(a), listed above, states in pertinent part:

- (1) Every year on the anniversary of a person's initial registration date, and again six months after that date, the Division² shall mail a nonforwardable verification form to the last reported address of the person.
- (2) The person shall return the verification form in person to the sheriff within three business days after the receipt of the form.
- (3) The verification form shall be signed by the person and shall indicate the following:

2. As of 1 July 2014, "Division" was changed to "Department of Public Safety." See 2014 N.C. Sess. Laws Ch. 100, S.B. 744.

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- a. Whether the person still resides at the address last reported to the sheriff. If the person has a different address, then the person shall indicate that fact and the new address.
- b. Whether the person still uses or intends to use any online identifiers last reported to the sheriff. If the person has any new or different online identifiers, then the person shall provide those online identifiers to the sheriff.
- c. Whether the person still uses or intends to use the name under which the person registered and last reported to the sheriff. If the person has any new or different name, then the person shall provide that name to the sheriff.

. . . .

(4) If the person fails to return the verification form in person to the sheriff within three business days after receipt of the form, the person is subject to the penalties provided in [N.C. Gen. Stat.] § 14-208.11. If the person fails to report in person and provide the written verification as provided by this section, the sheriff shall make a reasonable attempt to verify that the person is residing at the registered address. If the person cannot be found at the registered address and has failed to report a change of address, the person is subject to the penalties provided in [N.C. Gen. Stat.] § 14-208.11, unless the person reports in person to the sheriff and proves that the person has not changed his or her residential address.

N.C. Gen. Stat. § 14-208.9A(a) (2013). In *State v. Braswell*, 203 N.C. App. 736, 692 S.E.2d 435 (2010), a jury found the defendant guilty of violating N.C. Gen. Stat. § 14-208.11 for failure to register as a sex offender by failing to verify his address, because the defendant failed to return a verification form pursuant to N.C. Gen. Stat. § 14-208.9A(a)(4).³ *Id.* Accordingly, this Court interpreted what constitutes a violation of Section 14-208.9A(a)(4) and concluded that

3. We recognize that this Court in *Braswell* was interpreting an older version of the statute. However, the relevant portions interpreted are identical. See 2006 N.C. Sess. Laws Ch. 247, H.B. 1896.

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[i]n order to be convicted for failure to return the verification form after the receipt of the form pursuant to N.C. Gen. Stat. § 14-208.9A(a)(4), a defendant must have *actually* received the verification form. . . . The statute goes on to require that if the form is not timely returned, that the “sheriff shall make a reasonable attempt to verify that the person is residing at the registered address.” N.C. Gen. Stat. § 14-208.9A(a)(4). . . .

However, if a defendant is not found to be at the registered address, the crime to be charged is failure to report a change of address, subject to a defendant proving that he or she has “not changed his or her residential address.” N.C. Gen. Stat. § 14-208.9A(a)(4).

Id. at 738-39, 692 S.E.2d at 437 (emphasis added).

Therefore, to convict for the crime of failing to return a verification form as required under N.C. Gen. Stat. § 14-208.9A(a)(4), the State must prove five essential elements: (1) the defendant is a “person required . . . to register,” N.C. Gen. Stat. § 14-208.11(a); (2) the SBI mailed a non-forwardable verification form to the defendant’s last reported address, *id.* § 14-208.9A(a)(1); (3) the defendant actually received the verification form, *Braswell*, 203 N.C. App. at 738-39, 692 S.E.2d at 435; (4) “the sheriff [made] a reasonable attempt to verify that the [defendant] is residing at the registered address[.]” N.C. Gen. Stat. § 14-208.9A(4); *see also* *Braswell*, 203 N.C. App. at 738-39, 692 S.E.2d at 435; and (5) the defendant *willfully* failed to “return the verification form in person to the sheriff within three business days[.]” N.C. Gen. Stat. §§ 14-208.9A(a)(4), 14-208.11(a). “When reviewing a defendant’s motion to dismiss for insufficiency of the evidence, this Court must determine whether there is substantial evidence of every essential element of the offense.” *Holmes*, 149 N.C. App. at 577, 562 S.E.2d at 31 (citation omitted). Here, essential elements one and two are uncontested.

A. Element Three: Actual Receipt

Defendant argues that the State presented insufficient evidence of element three, that he actually received the verification form, and cites to *Braswell* for his assertion that: “The statute requires actual receipt of the verification form by the defendant, not simply the verification form being mailed and received by someone.” The State argues that it met its burden to show receipt and that *Braswell* is distinguishable because the mailing receipt in that case was returned unclaimed to the sheriff’s office.

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In *Braswell*, this Court held that the State failed to present sufficient evidence of receipt of the verification form in a similar situation and vacated the trial court's judgment sentencing the defendant for failure to register as a sex offender. *Braswell*, 203 N.C. App. at 738-39, 692 S.E.2d at 435. The defendant in *Braswell* was a registered sex offender who verified his registration information as required in May 2007, November 2007, and May 2008. *Id.* at 737, 692 S.E.2d at 436. When the SBI mailed a verification form in November 2008 via certified mail, return receipt requested, it was returned unclaimed to the Durham County Sheriff's Office on 2 December 2008. *Id.* On 23 January 2009, a deputy presented on two separate occasions to the defendant's last registered address in an attempt to verify his residence, but no one answered the door both times. *Id.* That same day, a warrant was issued for the defendant's arrest in violation of N.C. Gen. Stat. § 14-208.11. *Id.*

The defendant was indicted for failing to register as a sex offender by failing to verify his address for failure to return the verification form. *Id.* At trial, the defendant in *Braswell* testified that he never received the verification form; that he went to the sheriff's office to meet with the person in charge of the sex offender registration program to inquire about it, but she was out sick; that he made several calls to the person in charge of the program, never spoke with her, but left several messages; and that when he went to the sheriff's office in February 2009, he was arrested for failure to return the verification form. *Id.* The jury returned a guilty verdict against the defendant for failing to register as a sex offender by failing to verify his address. *Id.*

The defendant appealed to this Court and argued that the trial court erred in denying his motion to dismiss for insufficient evidence that the defendant received the verification form. *Id.* The State conceded error and this Court vacated the trial court's judgment, holding that

[i]n order to be convicted for failure to return the verification form after the receipt of the form pursuant to N.C. Gen. Stat. § 14-208.9A(a)(4), a defendant must have *actually* received the verification form. The evidence is uncontroverted that defendant never received the form; therefore, he cannot be convicted for failure to return the verification form.

Braswell, 203 N.C. App. at 739, 692 S.E.2d at 437 (emphasis added).

We recognize that in *Braswell*, the State conceded error, and it was uncontroverted that the defendant never received the verification form,

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as the certified mailing receipt was returned unclaimed. However, we are bound by our decision in *Braswell* that a registrant must *actually* receive the verification form before being convicted for the failure to return it. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”). In *Braswell*, evidence was presented that a nonforwardable verification form was sent to the defendant’s last registered address, but this was insufficient to sustain the conviction of failure to register as a sex offender for failure to verify his address. Therefore, in the instant case, we find unpersuasive the State’s contention that “N.C.G.S. § 14-208.9A indicates that a nonforwardable verification form shall be sent to the last reported address of the offender[.] . . . The evidence presented at trial shows that this statute was complied with by the State.” Furthermore, in *Braswell*, there was evidence that the defendant was familiar with the semi-annual verification requirement, as he had timely and properly verified his information in the past. Therefore, in the instant case, the State’s assertion that Defendant “was on notice of the requirement that he verify his information on the first anniversary of his registration date and every six months afterward” is of no consequence and also unpersuasive.

The State contends that it satisfied its burden to show receipt of the verification form by presenting the following evidence: that Defendant initially registered with Cleveland County in 2003 and was made aware of his regular registration requirements; that “[o]n or about the anniversary date and subsequent verification dates, the State’s sexual offender coordination unit mails a certified letter/packet” to registrants’ last reported addresses; that the AVSO letter informs the registrant that he or she must appear within three business days to verify or update his or her information at the sheriff’s office; “that the State system mailed certified [AVSO] letters to [D]efendant in 2012, January 2013 and 2014 and he timely appeared in person at the Sheriff’s office to verify his information[;]” and that in July 2013, AVSO letter was sent via certified mail, return receipt requested, to Defendant’s last registered address, and the mailing receipt was signed by Smith and returned to the sheriff’s office. We are not persuaded this constitutes actual receipt as considered in *Braswell* and note that actual receipt could have been easily shown by the State if it simply checked the box marked “Restricted Delivery?” and paid the extra fee to restrict delivery of the AVSO letter to the addressee, the sex offender.

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In its brief, the State argues that “[t]he statute does not indicate nor require that the offender personally sign for the letter.” It is true that the statute does not require the offender personally sign for the letter; however, it does require that the offender *actually* receives the form. See N.C. Gen. Stat. § 14-208.9A(a)(2) (“The *person* shall return the verification form . . . *after the receipt of the form.*”) (emphasis added); *Braswell*, 203 N.C. App. at 737, 692 S.E.2d at 437 (“[A] defendant must have *actually* received the verification form.”) (emphasis added).

Moreover, “[o]ur rules of statutory construction provide that ‘[s]tatutes imposing penalties are . . . strictly construed in favor of the one against whom the penalty is imposed and are never to be extended by construction.’” *Holmes*, 149 N.C. App. at 576, 562 S.E.2d at 30 (quoting *Winston-Salem Joint Venture v. City of Winston-Salem*, 54 N.C. App. 202, 205, 282 S.E.2d 509, 511 (1981)). Strictly construing N.C. Gen. Stat. § 14-208.9A, and bound as we are by our holding in *Braswell*, we conclude that “receipt” contemplates actual, and not constructive, receipt of the verification form by the registrant. Additionally, interpreting the clause “after receipt of the form” as considered in N.C. Gen. Stat. § 14-208.9A to identify someone other than the registrant—the “person” who potentially faces a Class F Felony—is a construction that would result in an impermissible extension of the criminal statute.

B. Element Four: Reasonable Attempt by Sheriff’s Office to Verify Address

This Court cannot agree with the State in its assertion that: “The evidence presented at trial shows that this statute was complied with by the State[,]” because the State failed to show substantial evidence that the sheriff’s office attempted to verify Defendant’s address. N.C. Gen. Stat. § 14-208.9A(4) provides: “If the person fails to report in person and provide written verification as provided by this section, the sheriff *shall* make a reasonable attempt to verify that the person is residing at the registered address.” *Id.* (emphasis added). This Court in *Braswell* noted that: “The statute goes on to require that if the form is not timely returned, that the ‘sheriff shall make a reasonable attempt to verify that the person is residing at the registered address.’ N.C. Gen. Stat. § 14-208.9A(a)(4). Deputy Baker performed this duty in the instant case.” *Braswell*, 203 N.C. App. at 738-39, 692 S.E.2d at 437.

Furthermore, the legislative history of N.C. Gen. Stat. § 14-208.9A(a)(4) indicates that our General Assembly intended for the sheriff’s office to make a reasonable attempt to verify that a registrant is still residing at the registered address before subjecting the person to the penalties provided

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in N.C. Gen. Stat. § 14-208.11. Prior to 2006, N.C. Gen. Stat. § 14-208.9A(a) (4) provided: “*If the verification form is returned to the sheriff as undeliverable*, the sheriff shall make a reasonable attempt to verify that the person is residing at the registered address.” 2006 N.C. Sess. Laws 247, HB 1896, § 7(a) (emphasis added). The legislature amended the statute in 2006 to replace this language with: “*If the person fails to report in person and provide the written verification as provided by this section*, the sheriff shall make a reasonable attempt to verify that the person is residing at the registered address.” *Id.* When the General Assembly amends a statute, “ ‘the presumption is that the legislature intended to change the law.’ ” *State v. White*, 162 N.C. App. 183, 189, 590 S.E.2d 448, 452 (2004) (quoting *State ex rel. Utilities Comm’n. v. Public Service Co.*, 307 N.C. 474, 480, 299 S.E.2d 425, 429 (1983)). Thus, by replacing the condition “the verification form is returned . . . undeliverable” with the condition “the person fails to report in person and provide the written verification[,]” the General Assembly expressed its intent to impose the duty on the sheriff’s office to make a reasonable attempt to verify the person is residing at his or her last registered address before initiating charges against the registrant under N.C. Gen. Stat. § 14-208.9A(a)(4). We conclude as a matter of statutory construction that N.C. Gen. Stat. § 14-208.9A requires a showing that the sheriff’s office made a reasonable attempt to verify the person is still residing at his or her last reported address before initiating criminal proceedings against the person.

The State failed to show that the sheriff’s department performed this duty in the instant case. The evidence indicates that the only attempt Deputy Proctor made to verify that Defendant still resided at his last registered address was to confirm with the local jail that Defendant was not incarcerated. The evidence also indicates that Lieutenant Acuff made no attempt at all; rather, he issued an arrest warrant for Defendant the same day he received Deputy Proctor’s report. Had the deputies performed their statutory duty in the instant case, this alleged violation would likely have been resolved before entering the court system.

C. Element Five: Willful Failure to Return the Verification Form

The record contains insufficient evidence that a jury could find Defendant *willfully* failed to return the verification form under N.C. Gen. Stat. § 14-208.9A(a).

While our Supreme Court has held that violating N.C. Gen. Stat. § 14-208.11(a) is a “strict liability offense,” *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (citing *Bryant*, 359 N.C. at 562, 614 S.E.2d at 484), this conclusion was based upon “a 1997 amendment

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... deleting the statutory *mens rea* requirement,” *Bryant*, 359 N.C. at 562, 614 S.E.2d at 484, which had previously provided that “only those offenders ‘who, knowingly and with the intent to violate the registration provisions’ ” would be guilty. *Id.*; 1997 N.C. Sess. Laws at 2281-82 (codified as amended at N.C. Gen. Stat. § 14-2011 (1997)). Our Supreme Court thus concluded that “no showing of knowledge or intent is necessary to establish a violation of N.C.G.S. § 14-208.11.” *Bryant*, 359 N.C. at 563, 614 S.E.2d at 484.

However, our legislature reinserted a statutory *mens rea* requirement of “willfulness” effective 1 December 2006. 2006 N.C. Sess. Laws, Ch. 247. By virtue of this 2006 amendment, we believe, as previously reasoned by this Court, that the legislature intended to consider violations under these provisions not as strict liability offenses, but as offenses requiring a showing of the requisite intent of willfulness. *See, e.g., Fox*, 216 N.C. App. at 156 n.1, 716 S.E.2d at 264 n.1 (“[W]ith its 2006 amendment, the General Assembly re-introduced intent-based language into the provision, effectively reviving the original *mens rea* requirement that had first been removed by the 1997 amendment and had rendered a violation of the statute a strict liability offense. Consequently, we believe that the elements of this offense should reflect the General Assembly’s reintroduction of intent-based language into the statute in 2006.”).

“ ‘Willful’ as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law.” *State v. Crockett*, __ N.C. App. __, __, 767 S.E.2d 78, 85 (2014) (quoting *State v. Arnold*, 264 N.C. 348, 49, 141 S.E.2d 473, 474 (1965)).

The word wilful, used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent without which one cannot be brought within the meaning of a criminal statute.

State v. Barr, 218 N.C. App. 329, 335, 721 S.E.2d 395, 400 (2012) (quoting *In re Adoption of Hoose*, 243 N.C. 589, 594, 91 S.E.2d 555, 558 (1956) (quotation omitted)). Here, even when viewed in the light most favorable to it, the State failed to show any evidence of willfulness on behalf of Defendant. To the contrary, Smith’s testimony that she never remembered signing for the July 2013 AVSO letter and that she discovered the

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misplaced AVSO letter months later, provides an excuse for Defendant's failure to return the verification form by 16 July 2013—that he never received it until October.

While the defendant's evidence is typically not to be taken into consideration, "the defendant's evidence may be used to explain or clarify that offered by the State." *Nabors*, 365 N.C. at 312, 718 S.E.2d at 627 (internal citation and quotation marks omitted). Here, Defendant's evidence of Smith's testimony that she did not remember signing for the AVSO letter; that she first learned of its misplacement when Defendant called her from jail; that Smith located the misplaced AVSO letter in between the sofa cushions in an unfrequented room, because she gained a new vantage point by standing on a chair to change the curtains in October; and that she immediately gave the AVSO letter to Defendant, explains and clarifies the State's evidence that Defendant returned the July 2013 verification form to the sheriff's office on 23 October 2013. We conclude the State provided no evidence of criminal intent as required to bring Defendant within the meaning of the criminal statute.

In summary, the State did not present sufficient evidence that Defendant actually received the verification form on 11 July 2013, as required to trigger the provisions of N.C. Gen. Stat. § 14-208.11(a)(3) against him for a willful failure to return the verification form. Put another way, the State presented no evidence from which a reasonable inference could be drawn that: first, Defendant actually received the verification form as required for a conviction of failure to return the verification form under N.C. Gen. Stat. § 14-208.9A(a)(4), *see Braswell*, 203 N.C. App. at 738-39, 692 S.E.2d at 435; second, the sheriff's office made a reasonable attempt to verify Defendant still resided at his last reported address; and third, Defendant acted willfully in failing to return the verification form. Therefore, Defendant's conviction for failure to return the verification form, which resulted in a judgment of approximately 10.5 to 13.75 years' imprisonment, should be vacated. *See State v. Richardson*, 202 N.C. App. 570, 574, 689 S.E.2d 188, 191-92 (2010) (vacating the defendant's convictions based upon the trial court erroneously denying the defendant's motions to dismiss).

III. Conclusion

For the foregoing reasons, we vacate the judgment of the below court.

VACATED.

Judges BRYANT and STROUD concur.

STATE v. STURDIVANT

[240 N.C. App. 480 (2015)]

STATE OF NORTH CAROLINA

v.

JOHNNY RAY STURDIVANT

No. COA14-1049

Filed 7 April 2015

Sentencing—prior record level—AOC report—identification of defendant

The trial court correctly determined that a defendant who plead guilty had six prior record points and was a felony record level III. Defendant received precisely the sentences for which he bargained, which were from the presumptive range of sentences for a defendant at felony sentencing level III. Defendant contended that he should have been sentenced at Level II because the State did not prove that one of the prior convictions was his. Although the birthdate on the AOC report was incorrect and the address was not defendant's address at the time of sentencing, it is not unusual for a person to have lived at a different address fourteen years earlier, and the discrepancy in the date of defendant's birth was not determinative. It is the role of the trial court to weigh the evidence, and the appellate court is bound by the trial court's determinations if supported by evidence in the record.

Appeal by defendant from judgments entered 2 April 2014 by Judge Ebern T. Watson, III, in Hoke County Superior Court. Heard in the Court of Appeals 16 February 2015.

Roy Cooper, Attorney General, by Angenette Stephenson, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by John F. Carella, Assistant Appellate Defender, for defendant-appellant.

STEELMAN, Judge.

The trial court correctly determined the number of prior record points and record level of the defendant.

I. Factual and Procedural Background

On 2 April 2014, Johnny Ray Sturdivant (defendant) pled guilty to one count of attempted first degree statutory rape of a person 13,

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14, or 15 years old, and nine counts of taking indecent liberties with a child. Defendant's plea arrangement with the State provided that all other charges against defendant were to be dismissed, and that defendant would be sentenced to three consecutive active sentences of 96-125 months, 21-26 months, and 21-26 months.

The trial court accepted defendant's plea, found defendant to be a prior record level III for purposes of felony sentencing, and entered three judgments imposing consecutive, active sentences in accordance with the plea agreement.

Defendant appeals.

II. Standard of Review

We review alleged sentencing errors for whether the sentence is supported by evidence introduced at the trial and sentencing hearing. *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (citation omitted). "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f) (2013).

III. Computation of Defendant's Felony Sentencing Level

In his only argument on appeal, defendant contends that the trial court incorrectly determined that he had six prior record points and was a felony record level III. We disagree.

We first note that defendant's plea arrangement was a plea bargain as to sentence as provided in N.C. Gen. Stat. §§ 15A-1021(c) and 15A-1023. Defendant received precisely the sentences for which he bargained, which were from the presumptive range of sentences for a defendant at felony sentencing level III.

At the sentencing hearing, defendant did not stipulate to his prior convictions or record level. The State submitted a print-out of defendant's record from the Administrative Office of the Courts (AOC). Defendant offered no evidence. The trial court found that defendant had six prior record points and was a prior record level III for felony sentencing. On appeal, defendant only contests one of the convictions found by the court, for communicating threats in Hoke County case 96 CRS 2984. He contends that the State failed to meet its burden of proving that this was a conviction of defendant, arguing that "the birthdate in the report was incorrect and the address was not Mr. Sturdivant's address at

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the time of sentencing.” Defendant contends that if the one sentencing point was removed, he would only be a prior record level II.

We first note that the address of defendant shown in the print-out for this conviction, “Lot 9 Lumbee Est MHP, Raeford, NC 28376,” is the address for nine of defendant’s cases prior to 2000, with the remaining five cases having the address of “Lot 7 Harts MHP, Raeford, NC 28376.” We hold that the fact that defendant was living at a different address at the time of sentencing is not controlling on the issue of whether this conviction was that of defendant. The sentencing hearing was held in 2014, and it is not unusual for a person to have lived at a different address fourteen years earlier.

The charges in this case showed defendant’s date of birth to be 27 March 1974. The AOC print-out presented at the sentencing hearing by the State identifies defendant by the same name and social security number, but contains two different birthdates; 27 January 1974 and 27 March 1974.

Under the provisions of N.C. Gen. Stat. § 15A-1340.14(f), a copy of a record maintained by the AOC “bearing the same name as that by which the offender is charged, is *prima facie* evidence that the offender named is the same person as the offender before the court. . .” N.C. Gen. Stat. § 15A-1340.14(f) (2013). As noted in Section II of this opinion, we review the sentence of the trial court to see if it is supported by evidence in the record. In the instant case, the identity of the name of the defendant is *prima facie* evidence that the record is that of the defendant. The name, coupled with the social security number and the same address in nine of his pre-2000 cases, provides evidence in the record that the conviction for communicating threats in Hoke County case 96 CRS 2984 was that of the defendant. Under the rationale of *State v. Safrit*, 154 N.C. App. 727, 572 S.E.2d 863 (2002), the discrepancy in the date of defendant’s birth is not determinative. It is the role of the trial court to weigh the evidence, and this Court is bound by the trial court’s determinations if supported by evidence in the record.

This argument is without merit.

IV. Conclusion

We affirm the trial court’s decision to assess one sentencing point for defendant’s conviction for communicating threats in Hoke County case 96 CRS 2984, and its determination that defendant was a prior record level III for felony sentencing.

AFFIRMED.

Chief Judge McGEE and Judge BRYANT concur.

FIELDS v. H&E EQUIP. SERVS., LLC

[240 N.C. App. 483 (2015)]

PAUL FIELDS, EMPLOYEE, PLAINTIFF

v.

H&E EQUIPMENT SERVICES, LLC, EMPLOYER, TRAVELERS, CARRIER, DEFENDANTS

No. COA14-1094

Filed 21 April 2015

Workers' Compensation—temporary total disability—failure to meet burden—expert testimony—inability to find any other work

The Industrial Commission erred in a workers' compensation case by awarding plaintiff employee temporary total disability (TTD) benefits. Plaintiff did not meet his burden to show that he was entitled to TTD compensation. Because plaintiff failed to provide competent evidence through expert testimony of his inability to find any other work as a result of his work-related injury, the opinion and award was reversed.

Appeal by Defendants from Opinion and Award entered 21 May 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals on 18 February 2015.

Hutchens Law Firm, by William L. Senter and Maggie S. Bennington, for the plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Ryan W. Keegan, for the defendant-appellants.

HUNTER, JR. Robert N., Judge.

Paul Fields ("Plaintiff") was injured at his place of employment on 24 May 2012. This injury resulted in significant pain and loss of physical capability. The Full Industrial Commission awarded Plaintiff total temporary disability ("TTD") compensation. H&E Equipment Services, LLC and Travelers ("Defendants") appeal, arguing that Plaintiff did not meet his burden to show that he is entitled to TTD compensation. Because Plaintiff failed to provide competent evidence through expert testimony of his inability to find any other work as a result of his work-related injury, we reverse the Opinion and Award.

FIELDS v. H&E EQUIP. SERVS., LLC

[240 N.C. App. 483 (2015)]

I. Factual & Procedural History

Plaintiff was employed as a mechanic for Defendant H&E Equipment Services for over eleven years. He is a sixty-five year old man with a tenth-grade education and some computer skills. Plaintiff's job as a mechanic involved physical activities such as changing batteries, tires, brakes, and other types of equipment. He was regularly required to stoop and lift, sometimes in excess of forty pounds. Beginning in 2006, Plaintiff saw Dr. James E. Rice ("Dr. Rice") for pain in his back. These visits escalated in 2011, when Plaintiff saw Dr. Rice three times for back and leg pain, at which time Dr. Rice placed Plaintiff on a home exercise program and gave him prescriptions for pain medicine and muscle relaxers. In addition to the prescriptions and exercise regimen, Dr. Rice also placed Plaintiff under a work restriction of lifting no more than twenty-five pounds. Dr. Rice also acknowledged that Plaintiff's condition, likely a degenerative disc disease, was expected to worsen over time without regard to work-related activities.

On 24 May 2012, Plaintiff sustained a back injury at his place of employment while removing a forty-three-pound battery from a vehicle, in violation of Defendant's and Dr. Rice's lifting restrictions. Plaintiff felt a "sting" in his back after lifting the battery, resulting in steadily increasing back and leg pain over the next few days. The following Tuesday, 29 May 2012, Plaintiff went to the emergency room for his pain. Plaintiff subsequently notified his employer of his accident and inability to work. Plaintiff's co-worker, Jeff Zima, took Plaintiff to U.S. Healthworks multiple times, for which Defendants covered the cost. After the second visit, U.S. Healthworks discharged Plaintiff, but Plaintiff sought continued help and treatment from Dr. Rice.

Dr. Rice noted Plaintiff's condition had worsened, with extremely limited ability to bend his back and legs. Additionally, Plaintiff's ranges of motion were limited and his spine and back muscles demonstrated increased tenderness, lumbar strain, lumbar degenerative disc disease, and sciatica. An MRI revealed significant changes in the lower three levels of his back. Dr. Rice then recommended that Plaintiff not return to his regular work and placed him on prescription pain medications and muscle relaxers. Plaintiff returned to Dr. Rice over the next few months with consistent back pain radiating through his legs, some numbness, and limited range of spinal and leg mobility. Dr. Rice testified it was more likely than not within a reasonable degree of medical certainty that Plaintiff had a pre-existing condition that had been aggravated by his work-related injury. Additionally, should Plaintiff's condition not improve, Dr. Rice stated he would recommend Plaintiff undergo surgery.

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On 2 August 2012, Plaintiff filed a Form 18 (Notice of Accident to Employer and Claim of Employee, Representative, or Dependent) and a Form 33 (Request that Claim be Assigned for Hearing), alleging a compensable injury to his back. On 1 October 2012, Defendant completed a Form 19 (Employer's Report of Employee's Injury or Occupational Disease), and a Form 61, denying the compensability of Plaintiff's back claim on the grounds that he did not sustain a specific traumatic incident.

On 19 April 2013, Plaintiff's case was heard by Deputy Commissioner Robert J. Harris. On 30 October 2013, Deputy Commissioner Harris issued an opinion finding that Plaintiff had established ongoing disability as of 24 May 2012 and was entitled to TTD benefits from 25 May 2012 through the present and ongoing. Plaintiff's employer was ordered to pay Plaintiff's TTD benefits at the rate of \$506.69 per week from 25 May 2012 onward, as well as payment for Plaintiff's medical treatments beginning 24 May 2012. Defendants gave proper Notice of Appeal to the Full Commission on 30 October 2013.

On 21 May 2014, the Full Commission issued an Opinion and Award affirming the Deputy Commissioner's decision. Defendants then filed a notice of appeal of the order of the Full Commission to this Court on 24 June 2014.

II. Jurisdiction

This Court has jurisdiction over appeals from the Industrial Commission pursuant to N.C. Gen. Stat. § 7A-29(a) (2014).

III. Standard of Review

“‘Appellate review of an order and award of the Industrial Commission is limited to a determination of whether the findings of the Commission are supported by the evidence and whether the findings in turn support the legal conclusions of the Commission.’” *Allred v. Exceptional Landscapes, Inc.*, ___ N.C. App. ___, ___, 743 S.E.2d 48, 51 (2013) (quoting *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 41, 415 S.E.2d 105, 106 (1992)). The Industrial Commission “is the sole judge of the credibility of the witnesses and the weight of the evidence[.]” *Hassell v. Onslow Cnty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008), and therefore “[t]he Commission’s findings of fact are conclusive on appeal if supported by competent evidence ‘notwithstanding evidence that might support a contrary finding.’” *Reaves v. Indus. Pump Serv.*, 195 N.C. App. 31, 34, 671 S.E.2d 14, 17 (2009) (quoting *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002)). “Unchallenged findings of fact are presumed to

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be supported by competent evidence and are binding on appeal.” *Allred*, ___ N.C. App. at ___, 743 S.E.2d at 51. “The Commission’s conclusions of law are reviewable *de novo*.” *Id.* “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotations omitted).

IV. Analysis

The issue on appeal is whether the Full Commission erred in awarding Plaintiff disability benefits: specifically, whether Plaintiff failed to meet his burden of showing that he is disabled as a result of a work injury. Defendants argue that the Full Commission’s Finding of Fact No. 37 is not supported by competent evidence in the record. Finding of Fact No. 37 states that, based on the evidence, it would be futile for Plaintiff to seek competitive employment that conforms with the work restrictions placed on Plaintiff by his doctor. Defendants also challenge the Commission’s Conclusion of Law No. 4, based on Finding of Fact No. 37. Conclusion of Law No. 4 states:

Plaintiff has met his burden of proving disability under prong three (3) of *Russell* by demonstrating that he has been and continues to be disabled as a result of his compensable 24 May 2012 injury in that it has been and continues to be futile for him to seek competitive employment that comports with the work restrictions that Dr. Rice has placed on him related to his 24 May 2012 injury. As such, plaintiff is entitled to temporary total disability compensation from 25 May 2012 through the present and continuing until plaintiff returns to work or further Order of the Commission.

The Workers’ Compensation Act requires an employee seeking compensation to prove the existence of his disability and its extent. *Newnam v. New Hanover Reg’l Med. Ctr.*, 212 N.C. App. 271, 282, 711 S.E.2d 194, 202 (2011). In order to prove compensable disability, our Supreme Court requires a plaintiff to prove three things:

(1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that the plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that . . . [the plaintiff’s] incapacity to earn was caused by [his] . . . injury.

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Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). A plaintiff must establish all three of the *Hilliard* elements in order to prove that he is legally disabled. *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 421, 760 S.E.2d 732, 737 (2014).

A plaintiff may satisfy the first two elements of *Hilliard* by producing one of the following: (1) medical evidence that he is mentally or physically incapable of working in any capacity; (2) evidence that he is capable of some work, but has not been able to find any; (3) evidence that he is capable of some work, but that it would be futile to attempt to find any based on his age, experience, or lack of education; or (4) evidence that he has obtained employment at a lower wage than his previous employment. *See Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). These are known as the *Russell* factors, and a plaintiff need only produce evidence of one *Russell* factor to satisfy the first two prongs of *Hilliard*. *See id.*

When an employee's attempts to obtain employment "would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 444, 342 S.E.2d 798, 809 (1986). In *Peoples* and a similar case, *Roset-Eredia v. F.W. Dillinger, Inc.*, medical and vocational expert testimony was offered to demonstrate futility of effort based on extreme injury, pain, and lack of transferable skill in a competitive market. *See Peoples*, 316 N.C. at 442-43, 342 S.E.2d at 809; *Roset-Eredia*, 190 N.C. App. 520, 525, 660 S.E.2d 592, 596-97 (2008).

In this case, Defendants argue that Plaintiff did not sufficiently demonstrate futility under the third prong of *Russell*. We agree.

Here, Plaintiff failed to meet prongs one, two, or four of *Russell* because he did not present any evidence of an attempt to gain employment as required by prongs two and four, nor that he is incapacitated so severely that he is incapable of working in *any* capacity as required by prong one. *See Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. Plaintiff's only remaining option to satisfy *Russell*, and thus, *Hilliard*, is prong three, which requires a showing of evidence that it would be futile for Plaintiff to attempt to find any work because of his age, experience, or lack of education. *See id.*

Plaintiff offered no testimony from a vocational expert that his pre-existing condition made it futile to seek any other employment opportunities in his job market. There was no evidence presented of any labor

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market statistics stating that his pre-existing condition made him incapable of re-entering the labor market. Plaintiff's medical expert did not state that his pre-existing condition or medical injury would make it impossible for him to work, only that he should not continue in his current role. Without any expert testimony establishing that Plaintiff's job with Defendant is the only job obtainable, or any evidence demonstrating that no other man of his age, education, experience, and physical capabilities is currently working anywhere, Plaintiff did not meet his burden of proof of disability under *Russell* prong three. Therefore, he failed to meet the first two requirements of *Hilliard*. See *Peoples*, 316 N.C. at 442-43, 342 S.E.2d at 809; *Roset-Eredia*, 190 N.C. App. at 525, 660 S.E.2d at 596-97 (concerning the need for vocational or medical expert testimony concerning futility of job search).

Defendants also argue that Plaintiff failed to present evidence to fulfill the third prong of *Hilliard*: "that . . . [the plaintiff's] incapacity to earn was caused by [his] . . . injury." *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683. We reject this argument. Based on the testimony of Dr. Rice, an expert in orthopedics and spinal injuries, Plaintiff established that his ongoing pain and disability is a result of his work-related injury from 24 May 2012. Dr. Rice testified that the injury was an aggravation of a pre-existing condition caused by the work-related incident. He also noted that Plaintiff's condition is significantly worse than his condition prior to the injury on 24 May 2012. Dr. Rice further recommended after the injury on 24 May 2012 that Plaintiff not resume his previous work activities. This expert testimony is sufficient to meet the requirement of the third prong of *Hilliard*.

Nevertheless, because Plaintiff failed to meet his burden of proof by failing to produce competent evidence that it is futile for him to seek any other employment, he has not satisfied the first two prongs of *Hilliard*. The Commission's Finding of Fact No. 37 is not supported by competent evidence. Thus, the Commission erred in making Conclusion of Law No. 4. We reverse the Commission's Opinion and Award.

REVERSED.

Judge STEPHENS and Judge TYSON concur.

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[240 N.C. App. 489 (2015)]

IN THE MATTER OF C.J.H.

No. COA14-1176

Filed 21 April 2015

1. Termination of Parental Rights—motion to continue hearing—denial not abuse of discretion

In an action to terminate a father's parental rights, the trial court did not abuse its discretion by initially denying respondent's motion to continue because respondent had not demonstrated any "extraordinary circumstances" that necessitated a continuance. At the beginning of the 9 July 2014 hearing, more than 90 days after the petition was filed, respondent's counsel moved to continue the hearing due to respondent's absence. After hearing arguments from both respondent and petitioner, the trial court denied the motion. Although respondent argued that the trial court erred because the case had not been previously continued and there was no indication that an additional week or two would have prejudiced either party, respondent bore the burden of demonstrating sufficient grounds for continuance and petitioner had no burden to show lack of prejudice.

2. Termination of Parental Rights—hearing—respondent not present initially—notice of arrival next day—allowing witness to finish testimony

In a termination of parental rights case where respondent was not present for the hearing initially but called and said he would appear the next day, the trial court did not abuse its discretion in allowing the petitioner to finish the direct examination of her witnesses, given the trial court's finding that respondent knew the correct date of the hearing, that respondent's counsel was present during the entire hearing, and that respondent was present the next day when any cross-examination would have occurred.

3. Termination of Parental Rights—abandonment—some support payments made

The trial court's findings of fact in a termination of parental rights case were sufficient to support at least one ground for termination, abandonment, pursuant to N.C.G.S. § 7B-1111(a)(7). The fact that respondent made some child support payments during the relevant six-month period did not undermine the trial court's findings that respondent did not voluntarily provide financial support for the juvenile before entry of a Tennessee child support order and

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that he failed to provide timely, consistent child support since the entry of that order.

4. Termination of Parental Rights—abandonment—requests for visitation—good faith—timeliness

Clear, cogent, and convincing evidence in a termination of parental rights case supported the trial court's conclusion that respondent had failed to make a good faith effort to visit the child. The trial court examined respondent's history of sporadic contact with the juvenile in evaluating whether his 2014 requests for visitation were made in good faith and, although the trial court must examine the relevant six-month period in determining whether respondent abandoned the juvenile, the trial court may consider respondent's conduct outside this window in evaluating respondent's credibility and intentions.

5. Termination of Parental Rights—abandonment—presents and cards—no prejudicial error

In a termination of parental rights hearing, there was no prejudicial error where the trial court erred by finding that respondent failed to send birthday and Christmas presents or cards in 2014, considering the discussion elsewhere in the opinion.

6. Termination of Parental Rights—abandonment—last-minute payments—last-minute requests for visitation

The trial court did not err in a termination of parental rights case by concluding that respondent had abandoned the juvenile. The trial court found that, during the relevant six-month period, respondent did not visit the juvenile, failed to pay child support in a timely and consistent manner, and failed to make a good faith effort to maintain or reestablish a relationship with the juvenile. Respondent's last-minute child support payments and requests for visitation did not undermine the conclusion that respondent had abandoned the juvenile.

Appeal by respondent from order entered 21 July 2014 by Judge Timothy I. Finan in District Court, Wayne County. Heard in the Court of Appeals 16 March 2015.

Mary McCullers Reece, for petitioner-appellee.

Jeffrey William Gillette, for respondent-appellant.

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STROUD, Judge.

Respondent-father appeals from an order terminating his parental rights to his daughter, C.J.H. (“Shelly”).¹ Respondent contends that the trial court erred in denying his motion to continue and challenges all three of the trial court’s grounds for termination of his parental rights. Because the trial court did not err in denying respondent’s motion to continue and the trial court’s findings of fact are sufficient to support at least one ground for termination, abandonment, we affirm the trial court’s order.

I. Background

While respondent and petitioner were dating, petitioner became pregnant with Shelly. In December 2008, Shelly was born. The three lived together in a mobile home in Tennessee for approximately eighteen months. On 31 May 2010, respondent left Shelly and petitioner without notifying petitioner that he intended to leave. A few months later, respondent resumed a previous relationship with another woman (“Ms. Smith”) with whom he had previously fathered a child. At the time of the hearing, respondent, Ms. Smith, and their two children lived in Mountain City, Tennessee.

In July 2010, petitioner began to date another man (“Mr. Jones”). Mr. Jones assumed the position of Shelly’s father as soon as petitioner and he began dating. In February 2012, petitioner and Shelly moved to Goldsboro, North Carolina to live with Mr. Jones, who is employed as a maintenance instructor crew chief at Seymour Johnson Air Force Base. In June 2012, petitioner and Mr. Jones married.

In June 2013, respondent emailed petitioner to inquire about the possibility of Mr. Jones adopting Shelly. But in January 2014, after receiving Consent to Adoption documents, respondent refused to consent to the adoption and requested visitation with Shelly.

On 4 March 2014, petitioner filed a petition to terminate respondent’s parental rights to Shelly and alleged that Mr. Jones would like to adopt Shelly, which was served upon respondent on 14 April 2014. The trial court appointed Kevin MacQueen as respondent’s counsel upon the petition’s filing. Respondent did not file an answer or any other responsive pleadings to the petition. MacQueen represented respondent at the pre-trial conference held on 8 May 2014. In the pre-trial conference order,

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

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which was entered with the consent of petitioner, respondent, and the guardian ad litem, the trial court set a hearing for 9 July 2014.

At the beginning of the hearing, respondent's counsel moved to continue the hearing due to respondent's absence. After hearing argument from both respondent and petitioner, the trial court denied the motion. During a break in the hearing, a juvenile court administrator informed the trial court that respondent had called to inquire what time the hearing began the following day. The trial court allowed petitioner to finish the direct examination of her witnesses that day. But in an effort to accommodate respondent who indicated he would arrive in Wayne County the next day, the trial court postponed the cross-examination of petitioner's witnesses to the afternoon of the next day. On 10 July 2014, respondent was present for the remainder of the hearing. He declined to cross-examine petitioner's witnesses but did present his own evidence.

On 21 July 2014, the trial court entered an order in which it found the following grounds for termination: (1) abandonment; (2) neglect; and (3) failure to establish paternity. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (5), (7) (2013). The trial court terminated respondent's parental rights to Shelly. On 20 August 2014, respondent gave timely notice of appeal.

II. Motion to Continue

Respondent contends that the trial court erred in (1) denying his motion to continue at the beginning of the hearing; If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary

A. Standard of Review

A trial court's decision regarding a motion to continue is discretionary and will not be disturbed on appeal absent a showing of abuse of discretion. Continuances are generally disfavored, and the burden of demonstrating sufficient grounds for continuation is placed upon the party seeking the continuation. Where the lack of preparation for trial is due to a party's own actions, the trial court does not err in denying a motion to continue.

In re J.B., 172 N.C. App. 1, 10, 616 S.E.2d 264, 270 (2005) (citations and quotation marks omitted). "Abuse of discretion results where the

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court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." *In re S.C.R.*, 198 N.C. App. 525, 531-32, 679 S.E.2d 905, 909 (brackets omitted), *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676 (2009). "If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *Id.* at 531, 679 S.E.2d at 909 (quotation marks omitted).

B. Analysis

[1] Respondent contends that the trial court abused its discretion in initially denying his motion to continue. N.C. Gen. Stat. § 7B-803 describes when a trial court may continue a hearing in an abuse, neglect, and dependency proceeding:

The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile. Resolution of a pending criminal charge against a respondent arising out of the same transaction or occurrence as the juvenile petition shall not be the sole extraordinary circumstance for granting a continuance.

N.C. Gen. Stat. § 7B-803 (2013). Additionally, N.C. Gen. Stat. § 7B-1109(d) provides: "Continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance." *Id.* § 7B-1109(d) (2013).

At the beginning of the 9 July 2014 hearing, more than 90 days after the petition was filed, respondent's counsel moved to continue the hearing due to respondent's absence. The trial court denied the motion and allowed petitioner to present evidence. During a break in the hearing,

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a juvenile court administrator informed the trial court that respondent had called to inquire what time the hearing began the following day. The trial court allowed petitioner to finish the direct examination of her witnesses that day. But in an effort to accommodate respondent who indicated he would arrive in Wayne County the next day, the trial court postponed the cross-examination of petitioner's witnesses to the afternoon of the next day.

The trial court made the following findings of fact that support its initial decision to deny respondent's motion to continue:

8. Pursuant to the Pre-Trial Order entered on May 8, 2014, this case was set for a special session of Wayne County Juvenile Court on Wednesday, July 9, 2014. The Order was delivered to all of the parties involved in this matter.

9. During the week prior to the trial of this matter, the Respondent Father contacted the Juvenile Court administrator, Allyson Smith, directly to request a continuance of this hearing and she advised him to contact his attorney, Kevin MacQueen.

10. Upon calling the case for hearing on July 9, 2014, Kevin MacQueen, counsel for the Respondent father[,] made a Motion to continue the hearing. . . . Mr. MacQueen advised the Court that he had written the Respondent Father on two occasions including sending the Respondent Father a copy of the Pre-Trial Order entered on May 8, 2014. Mr. MacQueen advised the Court that he had spoken to the Respondent Father on the Wednesday or Thursday of the week prior to the hearing. The Respondent Father had advised Mr. MacQueen that he had accepted a job in Nashville, Tennessee for three weeks to begin the week before the trial of this matter. Mr. MacQueen advised that the Respondent Father was the sole provider for his fiancée and his other two children and that the Respondent Father advised Mr. MacQueen that he would lose his job if he left the job to come to Court. Kim Benton, Guardian ad litem, advised the Court that she had spoken to the Respondent Father a couple of weeks prior to the trial and that the Respondent Father was aware of the Court date and time of the hearing prior to him leaving for the job in Nashville, Tennessee because . . . she had specifically advised him of the date and time in at least three previous conversations.

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11. The Petitioner objected to the Motion to continue and advised the Court that the Petition alleged a lack of involvement and unwillingness to travel to North Carolina to maintain a relationship with the minor child. Although the Court did not know if the above allegations of the Petitioner were true or not at the time of the Motion to Continue and the objection, the Court did consider these facts in making its ruling.

Respondent argues that the trial court erred in initially denying his motion to continue, because “the case had not been previously continued” and “there is no indication that an additional week or two would have prejudiced either party.” But respondent bore the burden of demonstrating sufficient grounds for continuance; petitioner had no burden to show lack of prejudice. *See J.B.*, 172 N.C. App. at 10, 616 S.E.2d at 270. Respondent agreed to take the job in Nashville despite the fact that he was aware of its conflict with the court date, and instead of filing a written motion to continue the week prior to 9 July 2014 so petitioner, her counsel, and the guardian ad litem would be advised of the situation, he waited until the matter was called for hearing to make an oral motion for continuance. Because respondent had not demonstrated any “extraordinary circumstances” that necessitated a continuance, the trial court did not abuse its discretion in initially denying respondent’s motion to continue. *See* N.C. Gen. Stat. §§ 7B-803, -1109(d).

[2] Respondent next contends that the trial court erred in allowing petitioner to finish the direct examination of her witnesses after it learned of respondent’s intention to arrive the next day. The trial court made the following findings that support its decision to allow petitioner to finish the direct examination of her witnesses but to postpone the cross-examination of those witnesses to the following day:

13. During a break in the hearing, the Juvenile Court administrator, Allyson Smith, advised the Court that the Respondent Father had called to inquire as to what time Court began the following day, Thursday, July 10, 2014. The Court requested that [Mr. MacQueen] call the Respondent Father during the break.

14. Mr. MacQueen advised the Court that the Respondent Father advised that Mr. MacQueen had [told him that the hearing] was on Thursday, July 10, 2014. Mr. MacQueen advised the Court that he did not specifically recall the telephone conversation with the Respondent Father but he

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could have advised the Respondent Father that the [hearing] was on Thursday, July 10, 2014 and not Wednesday, July 9, 2014 because Thursday, July 10, 2014 was a regular juvenile session for Wayne County. Mr. MacQueen advised the Court that the Respondent Father advised that he could be in Court the following day, Thursday, July 10, 2014 by 11 a.m[.] The Court advised that the Petitioner could conclude her direct examination of her witnesses and that the Respondent Father would have the right to cross examine after he arrived and to recall these witnesses for further examination. The Court further advised that after the Petitioner concluded the direct examination of her witnesses with Mr. MacQueen being present that the Court would recess the hearing until the following day, Thursday, July 10, 2014. Court resumed on Thursday, July 10, 2014 at 1 p.m. with evidence from the Respondent Father after the Respondent Father had an opportunity to meet with his attorney. The Respondent Father did not choose to cross examine the witnesses of the Petitioner.

The trial court also found that respondent knew the correct date of the hearing, because the guardian ad litem “had specifically advised him of the date and time [of the hearing] in at least three previous conversations.” We also note that the consent pre-trial order had set 9 July 2014 as the hearing date and that respondent had received that order.

Respondent argues that the trial court should have immediately recessed the hearing upon learning that respondent’s counsel may have given respondent the wrong date for the hearing. Relying on *In re Gibbons*, respondent specifically asserts that the trial court erred in allowing petitioner to complete the direct examination of her witnesses, because it deprived respondent of hearing that testimony firsthand and assisting his counsel in preparing for cross-examination of those witnesses. *See* 245 N.C. 24, 29, 95 S.E.2d 85, 88 (1956). But *Gibbons* is distinguishable. There, the Court held that the trial court had erred in excluding both parties from its *in camera* interviews with the juvenile and other witnesses. *Id.* at 28-29, 95 S.E.2d at 88. In contrast, here, respondent’s counsel was present during the entire hearing.

Additionally, the trial court afforded respondent the opportunity to confer with his counsel regarding petitioner’s witnesses’ testimony and be present for any cross-examination of those witnesses. Given the trial court’s finding that respondent knew the correct date of the hearing, the respondent’s counsel’s presence during the entire hearing, and

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respondent's presence for any cross-examination, we hold that the trial court did not abuse its discretion in allowing the petitioner to finish the direct examination of her witnesses. *See J.B.*, 172 N.C. App. at 10, 616 S.E.2d at 270.

III. Abandonment

On appeal, respondent challenges all three of the trial court's grounds for termination of his parental rights. But if we determine that the findings of fact support one ground for termination, we need not review the other challenged grounds. *See In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426-27 (2003). After reviewing the record, we conclude that the trial court's findings of fact are sufficient to support at least one ground for termination, abandonment, pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). On 4 March 2014, petitioner filed her petition to terminate respondent's parental rights. We therefore examine whether respondent had willfully abandoned the juvenile during the determinative six-month period from 4 September 2013 to 4 March 2014. *See* N.C. Gen. Stat. § 7B-1111(a)(7); *In re B.S.O.*, ___ N.C. App. ___, ___, 760 S.E.2d 59, 63 (2014).

A. Standard of Review

Termination of parental rights proceedings are conducted in two stages: adjudication and disposition. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). "In the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C. Gen. Stat. § 7B-1111(a)." *In re D.H.*, ___ N.C. App. ___, ___, 753 S.E.2d 732, 734 (2014); *see also* N.C. Gen. Stat. § 7B-1109(e) (2013). This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001). "If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *S.C.R.*, 198 N.C. App. at 531, 679 S.E.2d at 909 (quotation marks omitted). However, "[t]he trial court's conclusions of law are fully reviewable *de novo* by the appellate court." *In re S.N., X.Z.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008) (quotation marks omitted), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009). "It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be

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given their testimony.” *S.C.R.*, 198 N.C. App. at 531-32, 679 S.E.2d at 909 (brackets omitted).

B. Findings of Fact

[3] Respondent first challenges the trial court’s sub-conclusions 7(b), 7(c), and 7(d), because, during the relevant six-month period, respondent made some child support payments and “nearly” paid off his arrears. Although the trial court included these findings in its conclusions of law, we look at their substance and review them as findings of fact. *See B.S.O.*, ___ N.C. App. at ___, 760 S.E.2d at 63-64. The challenged findings of fact state that respondent acted in the following manner:

- b. Not voluntarily providing any financial support for the minor child prior to the entry of child support Order in Tennessee;
- c. Not providing *consistent* child support for the minor child since the entry of the child support Order in Tennessee;
- d. Intentionally not working for periods of time each year even though one direct consequence of these decisions by Respondent Father was his failure to pay child support in a *timely* and a *consistent* manner[.]

(Emphasis added.)

The fact that respondent made some child support payments during the relevant six-month period does not undermine the trial court’s findings that respondent did not voluntarily provide financial support for the juvenile before entry of the Tennessee child support order and that he failed to provide timely, consistent child support since the entry of that order. Moreover, the trial court made additional findings of fact that address respondent’s failure to provide timely, consistent child support:

27. After the Respondent Father and the Petitioner separated, the Respondent Father only paid a total of \$400 toward child support until he was [o]rdered to do so by a Court in Tennessee in October 2011. The Respondent Father purposely chose not to pay child support prior to the Court entering an Order against him. Since the Child Support Order was entered in October 2011, the Respondent Father has not paid child support on a consistent basis. The Respondent Father was ordered to pay \$181.00 per month plus an additional \$40.00 a month

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toward arrears. The Respondent Father has had substantial arrears due to his failure to pay prior to the Order being entered and his failure to pay on a timely basis after the Order was entered. The Respondent Father has been cited back to Court in Tennessee on numerous occasions due to the Respondent Father's failure to pay child support in a timely manner. The Respondent Father also had his driver's license suspended by the State of Tennessee for his failure to pay child support on a timely basis. The Respondent Father had his entire 2013 Income Tax Refund garnished due to his failure to [pay] his arrears in child support. The Respondent Father's last child support payment was sent in April 2014.

28. Petitioner received her child support for the months of January, February and April 2014. Petitioner also received \$2,500 on April 30, 2014. As of the date of this hearing, the Respondent Father is at least 2 months behind on his child support.

Respondent does not contend that he provided timely, consistent child support, nor does he challenge Findings of Fact 27 and 28. We also note that respondent's April 2014 payment falls outside the relevant six-month period. *See* N.C. Gen. Stat. § 7B-1111(a)(7). Accordingly, we hold that clear, cogent, and convincing evidence supports the trial court's sub-conclusions 7(b), 7(c), and 7(d). *See Huff*, 140 N.C. App. at 291, 536 S.E.2d at 840.

[4] Respondent next challenges sub-conclusions 7(e) and 7(g), because he requested visitation with the juvenile in January, April, and May 2014. The challenged findings of fact state that respondent acted in the following manner:

e. Refusing to drive five hours to have visits with the minor child (despite consistently driving to other states as far away as Utah for his job);

....

g. Failing to make a *good faith* effort to maintain and subsequently to reestablish a relationship with the minor child despite having the email of the Petitioner, knowing the Petitioner and the minor child lived in Goldsboro, North Carolina, the Petitioner's keeping the same phone number after she got a new number when Respondent

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Father caused her to lose her former phone number, seeing Petitioner at child support hearings in Tennessee, and having the phone number and address of Petitioner's family near his residence in Tennessee.

(Emphasis added.) The trial court found that respondent had texted Mr. Jones three times in 2014 to request visitation with the juvenile.

After no contact from the Respondent Father in 2013, the Respondent Father sent texts to [Mr. Jones] about visiting with the juvenile in January 2014 after the Respondent Father received the Consent to Adoption documents, in April 2014 after the Respondent Father was served with the Petition to Terminate his Parental Rights and in May 2014 after the Respondent Father was served with a copy of the Pre-Trial Order. [Mr. Jones] responded to the Respondent Father that given that there was a pending court action[,] they were advised by their attorney to wait until the Court action concluded.

The trial court noted that respondent made each of these requests after receiving a document related to either Shelly's adoption or this litigation. Moreover, the April and May 2014 requests for visitation fall outside the relevant six-month period. *See* N.C. Gen. Stat. § 7B-1111(a)(7). Additionally, the trial court made many additional findings of fact, which delineate respondent's history of sporadic contact with the juvenile, that support its ultimate finding that respondent's 2014 requests were not made in good faith:

[Finding of Fact] 19. After the Respondent Father and the Petitioner separated, the Respondent Father only visited with the juvenile on 4 occasions: 1 time for 2 hours in the month of October, 2010; 1 time for 1 hour in the month of August, 2011; 1 time for 3 hours in the month of April, 2012 and 1 time for 4 to 6 hours in the month of December 2012. . . .

20. The Respondent Father's only contact in 2013 with the Petitioner was an email on June 15, 2013 where the Respondent Father stated to the Petitioner that [Mr. Jones] should adopt the juvenile. The Respondent Father stated that he had changed his mind prior to the Petitioner's sending him a Consent to Adoption in January 2014.

. . . .

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22. The Respondent Father stated that he had continuously attempted to contact the Petitioner through text messages. However, the Respondent Father failed to provide any cellphone records reflecting his attempts to contact Petitioner or her husband even though he had been with the same cellular provider for the last 7 years. The Respondent Father claims that he attempted to call or text 2 or 3 times a week to attempt to visit with the juvenile. The Respondent Father also met the Petitioner and [Mr. Jones] on several occasions in 2011 and 2012 when they all attended child support court in Tennessee due to the Respondent Father's failure to pay child support on time and during these meetings he failed to request visitation with the juvenile.

23. The Respondent Father stated that he did not know where the Petitioner was other than in Goldsboro, North Carolina and he did not know how to contact the Petitioner. The Petitioner has had the same cellphone number since shortly after the Respondent Father and Petitioner separated. The family of the Petitioner still lives at the same address with the same telephone numbers as when the Respondent Father and Petitioner were still together. The Respondent Father took no steps to contact Petitioner or locate the Petitioner in Goldsboro, North Carolina. The Petitioner and [Mr. Jones] have lived at the same address since July 2013. Furthermore, the Respondent Father's girlfriend, [Ms. Smith], was able to communicate and coordinate visits between the Respondent Father and the juvenile in April and December 2012 after the Petitioner moved to North Carolina.

....

25. The Respondent Father has not provided any other gifts or cards since December 2012. The family of the Respondent Father has not visited or inquired of the minor child since October 2010. The mother of Respondent Father provided a \$50 gift card in October 2010 but has not provided any other gifts or cards since October 2010. The Respondent Father has chosen not to provide gifts or cards because he would not be there to see the juvenile receive these items. The Respondent Father acknowledged that

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the juvenile may know who he was if he had sent something to the juvenile.

....

32. All of the visitations [between respondent and the juvenile] took place in Tennessee near the home of the Respondent Father. Petitioner and [Mr. Jones] would offer visitation between the Respondent Father and [the] juvenile when they were in Tennessee visiting family. The Respondent father has not seen the juvenile since December 2012. The Petitioner visited to the State of Tennessee in January 2013 and February 2013 and offered the Respondent Father visitation. On one occasion the Respondent Father agreed and then later cancelled stating that . . . his other daughter[] was sick. On the other occasion, the Respondent Father replied that he was working out of town.

33. The Petitioner has offered the Respondent Father the opportunity to come to Goldsboro, North Carolina to visit with the juvenile since the Petitioner was concerned [with] letting the juvenile go since the juvenile does not know the Respondent Father. It is a 5 hour drive from Mountain City, Tennessee to Goldsboro, North Carolina. The Respondent Father refused the Petitioner's offers to visit in Goldsboro, North Carolina because he does not think it is fair that he has to travel to North Carolina and that he should be able to bring the juvenile back to Tennessee with him. The Respondent Father never attempted to visit the juvenile in Goldsboro, North Carolina.

....

[Conclusion of Law] 4. Petitioner offered Respondent Father visits on several occasions when she and her husband were travelling to Tennessee to see some of her family members.

5. Petitioner provided transportation from North Carolina to and from Tennessee for every visit the minor child had with Respondent Father, while Respondent Father never made a single trip to North Carolina to visit with the minor child.

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6. Respondent Father's complaints that he has been treated unfairly (by Petitioner regarding visitation with the minor child) are not credible or persuasive.

The trial court examined respondent's history of sporadic contact with the juvenile in evaluating whether his 2014 requests for visitation were made in good faith. Although the trial court must examine the relevant six-month period in determining whether respondent abandoned the juvenile, the trial court may consider respondent's conduct outside this window in evaluating respondent's credibility and intentions. *See S.C.R.*, 198 N.C. App. at 531-32, 679 S.E.2d at 909 ("It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." (brackets omitted)); *cf. Gerhauser v. Van Bourgondien*, ___ N.C. App. ___, ___, 767 S.E.2d 378, 389 (2014) (considering a party's conduct after determinative date established under the Uniform Child-Custody Jurisdiction and Enforcement Act in order to assess "the party's credibility and intentions"). In light of the trial court's findings on respondent's history of sporadic contact with the juvenile, we hold that clear, cogent, and convincing evidence supports the trial court's sub-conclusions 7(e) and 7(g) that respondent failed to make a good faith effort to visit Shelly. *See Huff*, 140 N.C. App. at 291, 536 S.E.2d at 840.

[5] Respondent also challenges the trial court's sub-conclusion 7(f) that he "[failed] to send birthday and Christmas presents or cards in 2013 and 2014 for the minor child[,] because the hearing took place before Shelly's 2014 birthday and Christmas 2014. The hearing took place on July 9 and 10, 2014. Shelly's birthday is December 22. Accordingly, we hold that the trial court erred in finding that respondent failed to send birthday and Christmas presents or cards in 2014. But in light of the following discussion, we hold that this error did not prejudice respondent.

C. Conclusion of Law

[6] Respondent challenges the trial court's conclusion of law that he abandoned Shelly. N.C. Gen. Stat. § 7B-1111(a)(7) provides: "The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion, or the parent has voluntarily abandoned an infant pursuant to G.S. 7B-500 for at least 60 consecutive days immediately preceding the filing of the petition or motion." N.C. Gen. Stat. § 7B-1111(a)(7).

"Abandonment implies conduct on the part of the parent which manifests a willful determination to forgo all parental duties and relinquish all parental claims to the child. The findings must clearly show that the

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parent's actions are wholly inconsistent with a desire to maintain custody of the child." *B.S.O.*, ___ N.C. App. at ___, 760 S.E.2d at 63 (citation, quotation marks, and brackets omitted). Abandonment also includes "[willful] neglect and refusal to perform the natural and legal obligations of parental care and support." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). "[I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and [willfully] neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Id.*, 126 S.E.2d at 608. "The word 'willful' encompasses more than an intention to do a thing; there must also be purpose and deliberation." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986). The willfulness of a parent's conduct is a "question of fact to be determined from the evidence[.]" *B.S.O.*, ___ N.C. App. at ___, 760 S.E.2d at 63. To constitute abandonment, "it is not necessary that a parent absent himself continuously from the child for the specified six months, nor even that he cease to feel any concern for its interest." *Pratt*, 257 N.C. at 503, 126 S.E.2d at 609. A delinquent parent may not dissipate at will the legal effects of his abandonment by merely expressing a desire for the return of the abandoned juvenile. *Id.* at 502, 126 S.E.2d at 609.

In *Searle*, this Court held that the respondent's \$500 child support payment during the relevant six-month period did not preclude a finding of willful abandonment. 82 N.C. App. at 276, 346 S.E.2d at 514. In *Pratt*, the North Carolina Supreme Court similarly held that the respondent's visit with the juvenile during the relevant six-month period did not preclude a finding of willful abandonment. 257 N.C. at 503, 126 S.E.2d at 609.

Here, the trial court found that, during the relevant six-month period, respondent did not visit the juvenile, failed to pay child support in a timely and consistent manner, and failed to make a good faith effort to maintain or reestablish a relationship with the juvenile. In light of *Searle* and *Pratt*, we hold that respondent's last-minute child support payments and requests for visitation do not undermine the trial court's conclusion that respondent had abandoned the juvenile. *See Searle*, 82 N.C. App. at 276, 346 S.E.2d at 514; *Pratt*, 257 N.C. at 503, 126 S.E.2d at 609. Accordingly, we hold that the trial court did not err in concluding that respondent had abandoned the juvenile. *See* N.C. Gen. Stat. § 7B-1111(a)(7).

Because we hold that the findings of fact support one ground for termination, we need not review the other challenged grounds. *See Humphrey*, 156 N.C. App. at 540, 577 S.E.2d at 426-27.

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IV. Conclusion

For the foregoing reasons, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

Judges HUNTER, JR and DILLON concur.

IN RE DISPUTE OVER THE SUM OF \$375,757.47, CONSTITUTING THE SURPLUS
CLOSING PROCEEDS FROM THE SALE OF THAT CERTAIN REAL PROPERTY
AS DESCRIBED IN A DEED RECORDED IN DEED BOOK 712, AT PAGE 570,
RUTHERFORD COUNTY, NORTH CAROLINA, PUBLIC REGISTRY

No. COA14-1239

Filed 21 April 2015

1. Mortgages and Deeds of Trust—satisfaction of note—bank no longer the holder

In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, there was no genuine issue of fact that a bank (Mountain 1st) was not the noteholder on 4 June 2010, when a certificate of satisfaction from Mountain 1st was recorded, purporting to cancel the property owners' obligation under a note. HSBC Bank USA, N.A. (HSBC) was subsequently assigned the note and sought the funds from the sale of the property, which had been placed in escrow. The record demonstrated no genuine issue of fact that Mountain 1st was not the note holder when the purported Certificate of Satisfaction was filed on 4 June 2010.

2. Mortgages and Deeds of Trust—satisfaction of note—subsequent to transfer to another bank

In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, a satisfaction executed by a bank was invalid and of no legal effect where the bank had assigned the note prior to the date the satisfaction was executed.

3. Mortgages and Deeds of Trust—satisfaction of note—transfer of note—summary judgement as to holder

In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, the property

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owner failed to forecast evidence sufficient to overcome the legal presumption and physical fact that HSBC Bank USA, N.A. (HSBC) was the holder of the original promissory note. HSBC presented the original note in open court at the summary judgment hearing and the note was unambiguously indorsed in blank by Wells Fargo. Although the property owners alleged that the note and deed of trust were separate legal contracts and that the note did not incorporate the terms of the deed of trust, they cited no law or authority to support their position.

4. Mortgages and Deeds of Trust—satisfaction of transferred note—escrow funds

In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, the trial court properly ordered escrowed funds from the sale of the property to be paid to HSBC Bank USA, N.A. (HSBC). The deed of trust provided to HSBC, as the last note holder, a security interest in all proceeds from the sale of the real property, and the right to collect the balance due under the note. No genuine issue of fact existed to challenge HSBC's note holder status and physical possession of the original note with an unpaid balance.

5. Mortgages and Deeds of Trust—satisfaction of transferred note—attorney fees

In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, the trial court properly awarded attorneys' fees to HSBC Bank USA, N.A. (HSBC). Although the property owners argued that they were not provided the required statutory notice of HSBC's intent to collect attorneys' fees, the uncontroverted evidence showed otherwise.

Appeal by respondent-third party defendants, from order entered 14 April 2014 by Judge Gary M. Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 18 March 2015.

Hutchens Law Firm, by J. Scott Flowers and Natasha M. Barone, for respondent-third party plaintiff, HSBC Bank, U.S.A, N.A.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Joseph A. Ponzi, for third party defendant, Mountain 1st Bank & Trust Company.

Ferikes & Bleyntat, PLLC, by H. Gregory Johnson, for respondent-third party defendants Raymond and Judy Chapman.

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[240 N.C. App. 505 (2015)]

TYSON, Judge.

Raymond and Judy Chapman (“the Chapmans”) appeal from the trial court’s order granting summary judgment in favor of HSBC Bank USA, N.A. (“HSBC”), and awarding attorneys’ fees in favor of HSBC. We affirm the trial court’s order.

I. Background

In 1998, the Chapmans purchased property located at 304 Seton Road in Lake Lure. They obtained title by general warranty deed recorded in the Rutherford County Registry. On or about 7 April 2006, the Chapmans refinanced their mortgage loan. They obtained a loan and executed a promissory note in the amount of \$600,000.00 from Mountain 1st Bank (“Mountain 1st”). The note was secured by a deed of trust recorded in the Rutherford County Registry, which pledged the subject property and any proceeds from the sale of the property as collateral for the note.

In the deed of trust, Mountain 1st named Mortgage Electronic Registration Systems, Inc. (“MERS”) as its nominee. MERS maintained an electronic registration system, by which it tracked any assignment of the promissory note and deed of trust.

Mountain 1st assigned the promissory note and deed of trust to Resource Mortgage Solutions, a division of Netbank, on or before 20 April 2006. On 30 June 2006, Netbank assigned the promissory note and deed of trust to Wells Fargo Bank, N.A. (“Wells Fargo”). On 4 June 2010, while Wells Fargo was the holder of the promissory note and deed of trust, Mountain 1st recorded a Certificate of Satisfaction in the Rutherford County Registry, purporting to satisfy and cancel the Chapmans’ obligation under the note.

Mountain 1st had assigned and relinquished being the holder of the promissory note and beneficiary of the deed of trust nearly four years before the Certificate of Satisfaction was recorded. Mountain 1st acknowledges it was without authority to execute and record the erroneous Certificate of Satisfaction. Wells Fargo assigned the promissory note and deed of trust to HSBC on 30 October 2012.

The Chapmans continued to make payments on the note for more than two years after Mountain 1st’s purported Certificate of Satisfaction was recorded. In August 2012, the Chapmans entered into an offer to purchase and contract to sell the property to Sylvia Pflum. Ms. Pflum’s attorney performed a title search in preparation for the closing and discovered the Mountain 1st Certificate of Satisfaction. The Chapmans

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were previously unaware of the Certificate of Satisfaction. Wells Fargo claimed to be the holder of the Chapmans' note and deed of trust, and demanded payment of the sale proceeds.

At the closing of the sale, the Chapmans and the closing attorney deposited \$375,757.47, the balance owed on the note, with an escrow agent pursuant to an Escrow Agreement executed by the Chapmans on 4 September 2012. Pursuant to the Escrow Agreement, the funds are to be held in escrow until either an agreement between the Chapmans and Wells Fargo is reached, or a court order directing the disbursement of funds is issued. The Escrow Agreement states that Wells Fargo asserts the Chapmans owe Wells Fargo \$363,936.00 in unpaid principal, interest and other fees and charges in connection with the mortgage. It further states that a payoff of the purported debt after 27 August 2012 "may include other fees and charges, including late fees and/or interest." After Wells Fargo assigned the note to HSBC, it recanted its claim to the funds.

On 15 October 2012, after the property was sold and titled to Pflum, MERS executed and recorded a Document of Rescission, which purported to rescind the Certificate of Satisfaction and reinstate the deed of trust. MERS executed and recorded a Corporate Assignment of Deed of Trust on 30 October 2012, which also assigned Mountain 1st's beneficial interest under the deed of trust to HSBC. On 3 March 2014, HSBC executed and recorded another Document of Rescission, purporting to rescind the Certificate of Satisfaction and reinstate the deed of trust. HSBC is in possession of the Chapmans' original note.

The promissory note and deed of trust specifically allow for the lender to collect all expenses, including reasonable attorneys' fees, from the Chapmans in the event the Chapmans breach their obligations under the promissory note.

After request, the Chapmans refused to release the escrowed funds to HSBC. On 6 February 2013, Daniel L. Strobel, the escrow agent, filed a complaint in Buncombe County Superior Court seeking a court order declaring the rights and interests of the parties to the escrowed funds. HSBC filed a motion to dismiss the complaint, answer, counterclaim against Strobel, cross-claim against the Chapmans, and third party complaint against Pflum and Mountain 1st.

HSBC filed a motion for summary judgment on 17 March 2014. The matter came before the trial court on 14 April 2014. The court granted summary judgment in favor of HSBC. The court entered judgment against the Chapmans in the amount of \$403,902.18, with interest

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accruing after judgment at the legal rate. The escrow agent was ordered to deliver the escrowed funds to HSBC to be applied toward satisfaction of the judgment. The court awarded attorneys' fees to HSBC in the amount of \$57,162.76, representing fifteen percent of the amount due as provided in the promissory note. The Chapmans appealed.

II. Issues

The Chapmans argue the trial court erred in: (1) granting summary judgment in favor of HSBC; and, (2) ordering them to pay HSBC's attorneys' fees.

III. Summary Judgment

The Chapmans argue the trial court erred in granting summary judgment in favor of HSBC. They assert the escrowed funds belong to them as a result of Mountain 1st's cancellation of the deed of trust, and are not required to satisfy the promissory note from the closing proceeds. We disagree.

A. Standard of Review

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56 (2013).

An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense. A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Generally this means that on 'undisputed aspects of the opposing evidential forecast,' where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.

Lowe v. Bradford, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (internal citations omitted). "In a motion for summary judgment, the evidence

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presented to the trial court must be . . . viewed in a light most favorable to the non-moving party.” *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (citation omitted).

“[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.” *Pacheco v. Rogers and Breece, Inc.*, 157 N.C. App. 445, 448, 579 S.E.2d 505, 507 (2003) (citation omitted) (emphasis supplied). “To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.” *Id.* (citation omitted). This Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

B. Erroneously Recorded Certificate of Satisfaction

The Chapmans assert they are entitled to the escrowed proceeds from the sale of the property and are not required to satisfy any debt from the proceeds. They argue Mountain 1st canceled the promissory note and deed of trust, and the cancellation instrument was not rescinded prior to the closing. We disagree.

It is undisputed Mountain 1st, the Chapmans’ original lender, purported to cancel the promissory note, secured by the deed of trust, by recording a Certificate of Satisfaction in the Rutherford County Registry on 4 June 2010. The Certificate of Satisfaction states:

I, Jeff Griffin, Vice President of Mountain 1st Bank & Trust certify that Mountain 1st Bank & Trust are the Owners of the aforesaid referenced [promissory note] and that the debt or obligation was satisfied on the 4th day of June, 2010, and request that the certificate of satisfaction be recorded and the above referenced security instrument be canceled of record.

In response to the Chapmans’ interrogatories and through its pleadings, Mountain 1st admits it was no longer the holder of the promissory note when Jeff Griffin recorded the Certificate of Satisfaction. At the time the certificate was recorded, Mountain 1st was without authority to discharge any obligation under the note. See N.C. Gen. Stat. § 25-3-604(a) (2013).

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1. Status of Mountain 1st on 4 June 2010

[1] The Chapmans argue HSBC and Mountain 1st failed to prove as a matter of law Jeff Griffin lacked authority to cancel the note on behalf of Mountain 1st. They assert the banks failed to produce sufficient documentation showing Mountain 1st had assigned, sold, or transferred the note prior to the 4 June 2010 purported cancellation. We disagree.

Mountain 1st's verified pleadings and answers to interrogatories show Mountain 1st registered the loan with MERS on or about 20 April 2006. Mountain 1st assigned the promissory note and deed of trust to RMS, a division of NetBank, on or before the date of registration with MERS. RMS assigned the note and deed of trust to NetBank on or before 11 July 2006. NetBank assigned the promissory note and deed of trust to Wells Fargo on or after 11 July 2006. There is no genuine dispute of the fact that Wells Fargo was the note holder in due course on 4 June 2010.

The Chapmans argue at length that the banks, HSBC and Mountain 1st, did not produce "properly authenticated" documentation evidencing the dates on which the assignments of the note occurred. "A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Rankin v. Food Lion*, 210 N.C. App. 213, 220, 706 S.E.2d 310, 315-16 (1999) (citation and quotation marks omitted).

HSBC's verified third party complaint incorporates the promissory note and deed of trust, and alleges Mountain 1st was not the holder of the note on 4 June 2010, and it was without authority to execute and record the satisfaction. The pleading meets the three criteria set forth in *Rankin*, and was properly treated as an affidavit for summary judgment by the trial court.

HSBC also submitted verified responses to the Chapmans' Interrogatories and Requests for Admission, which evidenced transfer of the note and deed of trust, and which are also appropriate for the court's consideration in ruling on summary judgment. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013).

Once HSBC produced verified evidence to show it was not the note holder on 4 June 2010, the burden shifted to the Chapmans to "demonstrat[e] specific facts, as opposed to allegations," to show Mountain 1st remained the note holder and possessed the lawful authority to cancel the note and deed of trust on 4 June 2010. *Pacheco*, 157 N.C. App. at 448, 579 S.E.2d at 507.

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The Chapmans attack the authenticity and admissibility of the verified documents relied upon by the trial court in ruling on summary judgment. However, they produced no forecast of evidence to show Mountain 1st did not assign the note prior to and it was not “the person entitled to enforce the instrument” on 4 June 2010. N.C. Gen. Stat. § 25-3-604(a) (2013). The record demonstrates no genuine issue of fact that Mountain 1st was not the note holder when the purported Certificate of Satisfaction was filed on 4 June 2010.

2. Authority to Cancel the Promissory Note

[2] “Discharge of instruments is controlled by N.C. Gen. Stat. § 25-3-604,” a subsection of the UCC. *G.E. Capital Mortg. Servs., Inc. v. Neely*, 135 N.C. App. 187, 190, 519 S.E.2d 553, 556 (1999); *see also* N.C. Gen. Stat. § 45-37(e) (2013) (“Any transaction subject to the provisions of the [UCC, Chapter 25], is controlled by the provisions of that act and not by this section.”). The statute provides:

(a) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party’s signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed writing.

N.C. Gen. Stat. § 25-3-604(a) (2013).

Jeff Griffin, agent of Mountain 1st, was not “a person entitled to enforce [the] instrument” on 4 June 2010. *Id.* The record shows Mountain 1st assigned the note prior to that date, no longer held or owned the loan, and was not “a person entitled to enforce an instrument.” *Id.* The erroneous satisfaction executed by Mountain 1st is invalid and was of no legal effect.

C. HSBC’s Status as Note Holder

[3] The Chapmans argue a genuine issue of material fact exists of whether HSBC attained holder status of the promissory note. We disagree.

An entity is considered the holder of a promissory note when they are the party in possession of the original note, and the note is “payable either to bearer or to an identified person that is the person in possession.” N.C. Gen. Stat. § 25-1-201(b)(21) (2013). Pursuant to our Uniform

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Commercial Code (“Code”), a promissory note is payable to bearer when it:

- (1) States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment;
- (2) Does not state a payee; or
- (3) States that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.

N.C. Gen. Stat. § 25-3-109 (2013).

“Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.” N.C. Gen. Stat. § 25-3-201(b) (2013).

An indorsement is a signature on the note that is intended to negotiate the instrument. N.C. Gen. Stat. § 25-3-204(a) (2013). The signature may be made on the instrument itself or on a paper affixed to negotiate the instrument, which becomes a part of the instrument. *Id.*

“[A] signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement.” *Id.* We recognize “a strong presumption in favor of the legitimacy of indorsements” to protect the transferees of negotiable instruments. *In re Bass*, 366 N.C. 464, 468, 738 S.E.2d 173, 176 (2013). A signature on an indorsement is presumed valid “until some evidence is introduced which would support a finding that the signature is forged or unauthorized.” *Id.* at 470, 738 S.E.2d at 177 (citation omitted).

Under the Code, the party in possession of a negotiable instrument indorsed in blank is presumptively the holder. N.C. Gen. Stat. § 25-1-201(b)(21) (2013); N.C. Gen. Stat. § 25-3-109 (2013) (emphasis supplied). *See also, In re Manning*, __ N.C. App. __, __, 747 S.E.2d 286, 291-92 (2013) (presentation of the original note to the court, indorsed in blank, “serves as competent evidence to support the trial court’s finding that [the party] was the present holder.”).

Here, HSBC presented the original note in open court at the summary judgment hearing. The note is unambiguously indorsed in blank by

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Wells Fargo. The indorsement is made by Joan M. Mills, Vice President of Wells Fargo, and does not identify a person to whom it is payable. HSBC holds physical possession of the note. The law presumes HSBC is the holder of the promissory note.

To attempt to overcome the Code's legal presumption, the Chapmans argue a genuine issue of fact exists of HSBC's holder status. They assert the version of the promissory note faxed to their counsel on 24 August 2012 differed from the original note their counsel inspected on 18 December 2012.

Our review of the record shows the only substantive difference between the two "versions" of the note is that the note faxed to the Chapmans' counsel does not show the blank indorsement made by Wells Fargo. This difference is logical. The note was transferred by Wells Fargo to HSBC on 30 October 2012, in between the time of the fax and the in-person inspection by counsel. The faxed copy of the note also establishes that the blank indorsement by Wells Fargo was the most recent indorsement to and negotiation of the note, which also supports HSBC's holder status.

The Chapmans also argue MERS, the nominee of Mountain 1st under the deed of trust, was without authority to assign the promissory note. They allege the note and deed of trust are separate legal contracts and the note did not incorporate the terms of the deed of trust.

The Chapmans cite no law or authority to support this bald position. The record shows MERS was merely the nominee under the deed of trust, and the note was never negotiated or transferred to MERS. The parties do not dispute that MERS was never the holder of the note. Moreover, a transfer of the promissory note or other instrument secured by the deed of trust "shall be an effective assignment of the deed of trust." N.C. Gen. Stat. § 47-17.2 (2013).

The "pleadings, depositions, answers to interrogatories, and admissions on file," establish: (1) the Chapmans' note was originally payable to Mountain 1st; (2) the note was negotiated and transferred to RMS on or before 20 April 2006, as evidenced by an allonge attached to the original note, signed by Mountain 1st and payable to the order of RMS; (3) RMS negotiated and transferred possession of the note to NetBank, on or before 30 June 2006, as evidenced by a second allonge attached to the original note signed by RMS and payable to NetBank; (4) NetBank negotiated and transferred possession of the note to Wells Fargo on 30 June 2006, evidenced by an indorsement on the RMS allonge signed by NetBank and payable to Wells Fargo; (5) Wells Fargo negotiated and

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transferred possession of the note to HSBC on 30 October 2012, as evidenced by an indorsement on the RMS allonge signed by Joan M. Mills, Vice President of Wells Fargo, and payable in blank, or to bearer. HSBC holds physical possession of the original note signed by the Chapmans. N.C. Gen. Stat. § 1A-1, Rule 56(c).

The Chapmans failed to forecast evidence sufficient to rebut or overcome the legal presumption and physical fact that HSBC is the holder of the original Chapman promissory note. *See Bass*, 366 N.C. at 470, 738 S.E.2d at 177 (The borrower’s “bare assertions” did not constitute evidence to support a finding that the indorsement signature was forged or unauthorized, the presumption in favor of the signature prevailed, and the bank was not required to prove the signature was valid.).

D. HSBC’s Entitlement to the Escrow Funds

[4] The deed of trust provides to HSBC, as the note holder, a security interest in all proceeds from the sale of the real property, and the right to collect the balance due under the note. The priority security interest in the deed of trust attached to the escrowed proceeds immediately upon the sale of the secured property to Pflum. *See In re Castillian Apartments, Inc.*, 281 N.C. 709, 711, 190 S.E.2d 161, 162 (1972) (The funds from the sale of real property “are constructively, at least, real property, and belong to the mortgagor or his assigns.”). As discussed and held above, the execution and recording of the Certificate of Satisfaction by Mountain 1st was invalid, because Griffin was not “a person entitled to enforce [the] instrument,” and his actions had no legal effect on HSBC’s note holder status. N.C. Gen. Stat. § 25-3-604(a) (2013).

As the Chapmans concede, the purpose of the Escrow Agreement was to ensure the holder of the note was paid from the closing proceeds. No genuine issue of fact exists to challenge HSBC’s note holder status and physical possession of the original note with an unpaid balance. The trial court properly ordered the escrowed funds from the sale of the property to be paid to HSBC.

IV. Award of Attorneys’ Fees

[5] The Chapmans argue the trial court erred in awarding attorneys’ fees in favor of HSBC. They assert they were not provided the required statutory notice of HSBC’s intent to collect attorneys’ fees. We disagree as the uncontroverted evidence shows otherwise.

N.C. Gen. Stat. § 6-21.2 allows for an award of attorneys’ fees in actions to enforce obligations owed under a promissory note, if the

IN RE DISPUTE OVER SUM OF \$375,757.47

[240 N.C. App. 505 (2015)]

note provides for the payment of attorneys' fees. N.C. Gen. Stat. § 6-21.2 (2013). Under the statute, a provision in the note for "reasonable fees" results in an award of fifteen percent of the outstanding balance owed on the note. N.C. Gen. Stat. § 6-21.2(2) (2013). "As to notes and other writing(s) evidencing an indebtedness arising out of a loan of money to the debtor, the 'outstanding balance' shall mean the principal and interest owing at the time suit is instituted to enforce any security agreement securing payment of the debt and/or to collect said debt." N.C. Gen. Stat. § 6-21.2(3) (2013). Here, the promissory note and deed of trust both contain provisions permitting the holder of the note and beneficiary of the deed of trust to collect their reasonable attorneys' fees upon breach and default. "Reasonable attorneys' fees" would equal fifteen percent of the outstanding balance owed on the note at the time HSBC filed its third party complaint and counterclaim. *Id.*

The statute also contains a notice provision, which requires the individual or entity seeking to enforce the note and/or deed of trust to notify the debtor "that the provisions relative to payment of attorneys' fees in addition to the 'outstanding balance' shall be enforced and that [the debtor] has five days from [providing] such notice to pay the 'outstanding balance' without the attorneys' fees." N.C. Gen. Stat. § 6-21.2(5) (2013). If the debtor pays the "outstanding balance" prior to the expiration of five days, then the obligation to pay attorneys' fees becomes void and unenforceable. *Id.*

"[T]he purpose of G.S. 6-21.2 is to allow the debtor a last chance to pay his outstanding balance and avoid litigation, not to reward the prevailing party with the reimbursement of his costs in prosecuting or defending the action." *Trull v. Central Carolina Bank & Trust*, 124 N.C. App. 486, 491, 478 S.E.2d 39, 42 (1996), *aff'd in part, review dismissed in part*, 347 N.C. 262, 490 S.E.2d 238 (1997).

The closing attorney discovered the Certificate of Satisfaction when the Chapmans were under contract to sell the property to Pflum. Prior to the closing, the Chapmans entered into the Escrow Agreement with Wells Fargo, the note holder and secured party, who claimed entitlement to the sale proceeds. The Escrow Agreement states the escrow agent shall retain the escrowed funds

until such time as a written agreement is entered into between Wells Fargo Bank/Wells Fargo Home Mortgage and [the Chapmans] regarding the validity and/or satisfaction of the aforesaid purported debt and Mortgage on the Real Property and the disposition of the Escrow Amount,

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or until such time as a court of competent jurisdiction, upon the institution of a declaratory judgment civil action by the Escrow Agent and after due notice to Wells Fargo Bank/Wells Fargo Home Mortgage, enters a final judgment regarding the validity and/or satisfaction of the aforesaid purported debt and mortgage on the Real property and the disposition of the Escrow Amount.

HSBC stepped into the shoes of Wells Fargo when Wells Fargo assigned and delivered physical possession of the note to HSBC. *See* N.C. Gen. Stat. § 25-3-203(b) (2013) (“Transfer of an instrument . . . vests in the transferee any right of the transferor to enforce the instrument[.]”) Pursuant to the Escrow Agreement, the Chapmans could have entered into a written agreement with HSBC, the transferee, and relinquished the escrowed funds to HSBC.

On 30 October 2012, following the execution of the Escrow Agreement, Wells Fargo assigned the note to HSBC and relinquished its claim to the sale proceeds. The escrow agent filed the complaint in February of 2013, and sought a court order declaring the rights and interests of the parties to the escrowed funds. The Chapmans filed an answer. HSBC filed a motion to dismiss, answer, counterclaim, cross-claim, and third party complaint.

HSBC’s pleading states:

The Chapmans are hereby notified pursuant to N.C. Gen. Stat. § 6-21.2 that the Chapmans have five days from the date of service of this pleading to pay the Note in full to avoid the payment of HSBC’s attorney fees and costs for collection of the Note.

HSBC’s pleading contained the statutory notice required by N.C. Gen. Stat. § 6-21.2. The Chapmans received HSBC’s notice of intent to collect attorneys’ fees, as evidenced by their answer to HSBC’s pleading, and failed to release and pay the escrowed funds to HSBC within five days. The trial court properly awarded attorneys’ fees in the amount of fifteen percent of the outstanding balance to HSBC as provided in the promissory note and deed of trust the Chapmans agreed to and signed as provided in N.C. Gen. Stat. § 6-21.2(3) (2013).

V. Conclusion

Mountain 1st’s erroneous cancellation of the promissory note and deed of trust was invalid and of no legal effect. Mountain 1st was not the note holder or a person entitled to enforce the instrument when the

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Certificate of Satisfaction was executed and recorded. N.C. Gen. Stat. § 25-3-604(a) (2013). The Chapmans failed to present evidence to overcome the legal presumption that HSBC is the note holder, and entitled to the escrowed proceeds from the sale of the property.

No genuine issue of material fact exists of HSBC's note holder status. The trial court properly awarded summary judgment in favor of HSBC. The trial court also properly determined that HBSC is entitled to the escrowed funds, and to be paid from the escrowed funds.

HSBC provided the required statutory notice of its intent after five days to collect attorneys' fees in its responsive pleading and counterclaim, as is provided both in the promissory note and deed of trust the Chapmans signed. The trial court did not err in awarding attorneys' fees in favor of HBSC, against the Chapmans, under N.C. Gen. Stat. § 6-21.2. The trial court's order of summary judgment is affirmed.

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

IN THE MATTER OF FORECLOSURE OF DEEDS OF TRUST EXECUTED BY GROVER C. BROWN AND WIFE,
MARGARET C. BROWN DATED APRIL 1, 1980, RECORDED IN BOOK 949 AT PAGE 109, AND BOOK 949
AT PAGE 111 OF THE BUNCOMBE COUNTY REGISTRY

No. COA14-937

Filed 21 April 2015

**Statutes of Limitation and Repose—foreclosure—ten years—
failure to exercise acceleration clauses—power of sale on
due date of final payments**

The trial court did not err by concluding that the statute of limitations did not bar foreclosure of the pertinent two notes. The trial court correctly applied N.C.G.S. § 1-47(3), finding that it was the later of the provisions contained in the statute that triggered the accrual of the statute of limitations. Since the note holder elected not to exercise either of the notes' acceleration clauses, the power of sale did not become absolute until the date that the final payments were due. Since foreclosure proceedings were initiated in 2012, well within the ten-year statute of limitations, N.C.G.S. § 1-47(3) did not bar the foreclosure action on either Note 1 or Note 2.

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[240 N.C. App. 518 (2015)]

Appeal by respondents from order entered 9 April 2014 by Judge J. Thomas Davis in Buncombe County Civil Court. Heard in the Court of Appeals 4 March 2015.

BULL & REINHARDT, PLLC, by Adam W. Bull, for appellee.

Wilder Wadford, for appellants.

ELMORE, Judge.

On 1 April 1980, Sherrill Brown and Merton L. Brown conveyed two pieces of real property in Buncombe County to Grover C. Brown and Margaret C. Brown (“appellants”) by two warranty deeds. Grover C. Brown was Sherrill Brown’s father and Merton Brown was Grover’s step-mother. In exchange for the conveyance, appellants executed two purchase money promissory notes, secured by separate deeds of trust, in the amounts of \$245,000.00 (“Note 1”) and \$55,000.00 (“Note 2”). The principal and interest due on the notes was payable to Sherrill and Merton Brown in monthly installments over the next thirty years. The parties have stipulated that the maturity date on the notes was 1 April 2010. A deed of trust securing Note 1 was recorded in Book 949 at Page 109. A deed of trust securing Note 2 was recorded in Book 949 at Page 111, with both deeds of trust appearing on record in the Buncombe County Registry of Deeds. Both deeds of trust contain provisions allowing for acceleration of the indebtedness upon default.

Upon Sherrill Brown’s death in 1988, Merton Brown, as executrix of his estate, assigned herself Sherrill Brown’s interest in Note 1 and Note 2, which had remaining principal balances of \$214,572.26 and \$48,169.03, respectively.

Appellants continued to make payments on both notes until 1 February 1995. At that time, the remaining principal balance was \$214,572.26 on Note 1 and \$48,169.03 on Note 2. After appellants made their final payment in 1995, Merton Brown did not accelerate the amounts due under Note 1 or Note 2.

In April 1995, Grover Brown offered Merton Brown \$100,000.00 in proceeds from the sale of dairy cattle as payment on Note 1 and Note 2. Merton Brown refused to accept the \$100,000.00. Merton Brown informed Grover Brown that she had forgiven the debts and would not foreclose on the deeds of trust. In reliance on this, Grover Brown and Margaret Brown ceased making additional payments on the notes.

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Appellants allegedly used the \$100,000.00 to convert the property into a beef cattle, hay, and tobacco farm, which is how it currently operates today. Both parties concede that after 1 April 1980, Sherrill B. Brown and Merton L. Brown resided on the property described in the deeds of trust for the remainder of their respective lives. There is evidence in the record that appellants were Merton Brown's primary caretakers until her death in October 2012.

Appellants live on a lot adjacent to the mortgaged property and their two sons live on portions of the mortgaged property. Appellants and their family have farmed and maintained the property since 1980. Therefore, appellants have been in actual possession of the subject property for over thirty-three years, and for more than eighteen years since the last payment was made on Note 1 and Note 2.

The deeds of trust securing the notes were never cancelled on the record in the Buncombe County Registry, and both deeds contain a power of sale as contemplated by the Foreclosure Statute of Limitations. As the holder of Note 1 and Note 2, the Estate of Merton Brown accelerated payment on the notes after Merton Brown's death, demanding that appellants tender a total of \$1,288,969.81 in full satisfaction of their indebtedness. Appellants were unable to meet the Estate's demand.

On 8 October 2012, the Executor of Merton Brown's estate commenced this foreclosure action. The matter came on for a hearing before the trial court on 9 April 2014. The trial court found as a matter of law that debts evidenced in Note 1 and Note 2 had not been discharged in full in April of 1995. As such, the trial court found that the notes were currently in default and that the Trustee was authorized and had the right to proceed with the sale and foreclosure of the property described in the deeds of trust.

Appellants have appealed the trial court's determination.

I. Analysis

Appellants argue that the trial court erred in concluding that the statute of limitations does not bar foreclosure in this matter. We disagree.

N.C. Gen. Stat. § 1-47 sets a ten-year statute of limitations during which time a foreclosure action may be commenced. The statute provides:

For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage,

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or after the power of sale became absolute, or within ten years after the last payment on the same.

N.C. Gen. Stat. § 1-47 (2013).

Therefore, in order for a foreclosure to be barred under this section, two events must occur: (1) the lapse of ten years after the forfeiture or after the power of sale becomes absolute or after the last payment, and (2) the mortgagor remains in absolute possession during the entire ten-year period. *Matter of Lake Townsend Aviation, Inc.*, 87 N.C. App. 481, 484, 361 S.E.2d 409, 411 (1987). “These two requirements must be coexistent.” *Id.*

In the instant case, the parties have stipulated that the maturity date of the notes was 1 April 2010. The last payment on the notes was made in February 1995, more than ten years before this foreclosure proceeding was initiated. As such, the central question on appeal is when did the power of sale become absolute—on the date of the last payment or on the date of maturity? To answer this question, we must consider whether the conditions set forth in N.C. Gen. Stat. § 1-47 are interpreted as beginning to run ten years from the later of the three conditions it sets forth (lapse of ten years after the forfeiture, after the power of sale becomes absolute, or after the last payment) or from the earlier occurrence of the conditions.

Appellants’ position is that the statute of limitations begins to run when any of the statutory conditions *first* occurs. In the instant case, the first statutory condition to occur was the date of the last payment (date of default), which was in February 1995. Thus, according to appellants, the statute of limitations for the foreclosure action began to run in 1995 and expired ten years later, in 2005. Appellants thus argue that this foreclosure action is barred by the statute of limitations.

We are not persuaded by appellants’ argument. In *E. H. & J. A. Meadows Co. v. Bryan*, 195 N.C. 398, 401-02, 142 S.E. 487, 489-90 (1928), our Supreme Court concluded:

A provision in a mortgage or deed of trust by the terms of which the maturity of a note or of notes secured thereby is accelerated, for the purpose of foreclosure, upon a default of the maker, confers upon the mortgagee or trustee an option to foreclose, at the date of such default, by the exercise of a power of sale, contained in the mortgage or deed of trust, or by civil action. This option may be waived by the mortgagee, or by the holder of the notes secured by the

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deed of trust. *In the absence of evidence tending to show some action on the part of the mortgagee [to accelerate the loan] . . . waiver will be conclusively presumed. In that event, the statute of limitations will not begin to run from the date of such default, and an action to foreclose said mortgage or deed of trust will not be barred, **until after the expiration of ten years from the maturity of all the notes secured thereby**, notwithstanding the provision for the acceleration of the maturity of notes not due at date of such default.* A power of sale contained in a mortgage or deed of trust may be exercised at any time within ten years after the maturity of any note, secured by the said mortgage or deed of trust, according to its tenor, for the purpose of enforcing its payment out of the proceeds of a sale of the land.

Id.

Bryan stands for the proposition that the statute of limitations does not begin to accrue on the date of default (last payment), but instead begins on the date of maturity of the loan, unless the note holder or mortgagee has exercised his or her right of acceleration.¹ However, if payment on a promissory note is accelerated, the power of sale would begin to run on the date of acceleration.

This legal principal is evidenced in *Matter of Lake Townsend Aviation, Inc.*, 87 N.C. App. 481, 361 S.E.2d 409 (1987). On 22 May 1970, Lake Townsend executed a \$12,000 note payable to the mortgagee. *Id.* at 482, 361 S.E.2d at 410. However, Lake Townsend never made any payments on this note. *Id.* at 486, 361 S.E.2d at 412. Although the mortgagee sent letters to Lake Townsend demanding payment and threatening to accelerate the note, this Court found that the mortgagee did not in fact accelerate payment on the note. *Id.* Since the mortgagee failed to exercise the acceleration clause, this Court held that the statute of limitations did not begin to run until 1 June 1976, the maturity date or the day the last payment on the \$12,000 note was due. *Id.* Notably, the *Lake Townsend* court did not conclude that the statute of limitations began to accrue on the date of default, which would have been the date that the first payment on the note was due. *See id.*

1. We note that the statute of limitations our Supreme Court was interpreting in *Bryan* contains the same language as our present statute, N.C. Gen. Stat. § 1-47.

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In the instant case, the trial court found (and the parties do not dispute) that, after appellants' final payment in 1995, Merton Brown did not accelerate the amounts due under either Note 1 or Note 2. Since Merton Brown elected not to exercise either of the notes' acceleration clauses, the power of sale did not become absolute until the date that the final payments were due. As such, the statute of limitations did not begin to accrue until April 2010, the stipulated maturity date for each note. *See id.* at 486, 361 S.E.2d at 412. Had there been a prior acceleration of the total indebtedness, the power of sale would have become absolute at that time and the statute of limitations would have started to run. However, this is not the scenario in the present case.

The trial court correctly applied N.C. Gen. Stat § 1-47(3), finding that it is the later of the provisions contained in the statute that triggers the accrual of the statute of limitations. Because foreclosure proceedings were initiated in 2012, well within the ten-year statute of limitations, N.C. Gen. Stat. § 1-47(3) does not bar the foreclosure action on either Note 1 or Note 2. We affirm.

Affirmed.

Judges GEER and INMAN concur.

TIMOTHY LOWE, EMPLOYEE, PLAINTIFF

v.

BRANSON AUTOMOTIVE, EMPLOYER AND HARTFORD INSURANCE COMPANY,
CARRIER, DEFENDANTS

No. COA 14-1118

Filed 21 April 2015

Workers' Compensation—claim denied—findings supported by competent evidence

In plaintiff's appeal from the Opinion and Award of the full Industrial Commission denying his claim for Workers' Compensation benefits, the Court of Appeals affirmed the Commission, holding that the challenged findings of facts were supported by competent evidence; any reliance on incompetent evidence was not prejudicial; the evidence was not weighed improperly; and the Deputy Commissioner's findings of fact were not binding on the full Commission.

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[240 N.C. App. 523 (2015)]

Appeal by plaintiff from Opinion and Award entered 26 June 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 February 2015.

Casey S. Francis, for plaintiff.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Lindsay N. Wise and M. Duane Jones, for defendants.

ELMORE, Judge.

Plaintiff appeals from the North Carolina Industrial Commission's ("the Commission" or "the Full Commission") Opinion and Award denying his claim for Workers' Compensation benefits. After careful consideration, we affirm.

I. Facts

Timothy Lowe (plaintiff) was employed as a tire technician by Branson Automotive (defendant-employer) for over six years as of the date of review by the Commission. Plaintiff's duties as a tire technician included mounting, dismounting, and balancing tires and conducting oil changes. The job also required frequent lifting of 50-100 pounds, bending, and squatting.

Plaintiff filed a Form 18 ("Notice of Accident to Employer") on 28 February 2012 seeking workers' compensation benefits, alleging that on 8 February 2012:

[He] was lifting a wheel and tire, which weighed approximately 110 pounds with both hands. As he was lifting the tire he felt a pop and an immediate onset of pain in his neck. [He] went to grab his neck with one hand, leaving the wheel and tire in his other hand. While supporting the weight of the wheel and tire with one hand, [he] felt another pop in his lower back an[d] immediately began to experience pain in his lower back with radiating tingling and numbness in his bilateral hands and feet.

Plaintiff's claim was heard before Deputy Commissioner Kim Ledford on 12 December 2012. The Deputy Commissioner entered an Opinion and Award concluding that plaintiff "sustained an injury by accident in the form of a specific traumatic incident arising out of and in the course of his employment with [defendant-employer], resulting in injury to his neck and lower back." The Deputy Commissioner ordered

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defendant-employer and defendant Hartford Insurance Company (collectively “defendants”), the insurer on the risk on the date of the alleged injury, to pay for: 1.) all medical treatment reasonably necessary for plaintiff’s injury and 2.) temporary total disability benefits to plaintiff at the rate of \$443.18. Defendants appealed to the Full Commission.

After reviewing defendants’ appeal, the Commission reversed the Deputy Commissioner’s Opinion and Award, concluding that “[p]laintiff did not sustain an injury by accident or suffer an injury to his back as a result of a specific traumatic incident of the work assigned, on February 8, 2012. . . . Therefore, [p]laintiff’s claim for benefits under the North Carolina Workers’ Compensation Act must be denied.”

The Commission found the following relevant facts in support of its legal conclusion: during both the discovery period and hearing before the Deputy Commissioner, plaintiff did not fully disclose his history of treatment for back problems that occurred before the alleged 8 February 2012 injury. Although plaintiff conceded his back ached on occasion and that he saw his primary care physician, Dr. Thomas Milton Futrell, for back pain, evidence presented at the hearing indicated that plaintiff sought treatment on numerous occasions for re-occurring back pain before 8 February 2012.

On 9 and 15 February 2012, plaintiff sought medical treatment at Medzone. Nurse Martha Jo Denton met with plaintiff. Ms. Denton testified that plaintiff gave her no indication that his back pain resulted from a specific incident at work. Rather, Ms. Denton stated that plaintiff reported having suffered daily back pain for the past two years and the pain had worsened within the last two days.

Similarly, Mrs. Patti Branson, wife of Elliott Branson (the owner of defendant-employer) and defendant-employer’s benefits manager, testified that plaintiff did not contact her about his alleged back injury even though he had previously reported a workers’ compensation claim to her on 14 June 2010 related to a knee injury. She learned about the alleged 8 February 2012 injury 16 days after the purported incident, when she called plaintiff at home to inform him of his short-term disability benefits.

After the alleged work-related injury, plaintiff saw several specialists to help treat his back pain, including Dr. Mark Dumonski, Dr. Hao Wang, and Dr. Andreas David Runheim. All three doctors gave expert witness deposition testimony before the Deputy Commissioner and stated they had no knowledge of plaintiff’s preexisting history of back

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pain when they evaluated plaintiff and reached their conclusions about the cause of his back problems.

Accordingly, the Full Commission also found plaintiff's lack of credibility as a key factor in denying his claim:

11. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's testimony that he sustained an injury to his neck and back at work on February 8, 2012 is not accepted as credible. Since the inception of the litigation of this claim, Plaintiff has given varying descriptions of how his alleged injury occurred. Plaintiff did not disclose his prior back problems to Defendants in discovery and did not tell Drs. Dumonski, Wang, or Runheim about his prior back problems. Plaintiff did not report a work-related injury to Mr. Branson on the alleged date of injury, and when he saw Nurse Denton, he did not relate his low back pain to an injury or incident occurring at work on February 8, 2012. To the extent that Plaintiff's wife, Manda Lowe, and Plaintiff's life-long friend, Joey Creasey, testified that Plaintiff told them he was injured at work, the Full Commission places greater weight on the testimony of Mr. and Mrs. Branson and the records and testimony of Nurse Denton.

II. Analysis**a.) Findings of Fact**

Plaintiff challenges numerous findings of fact in the Commission's Opinion and Award. We examine each of plaintiff's contentions below.

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citations and quotation marks omitted). We review the Full Commission's conclusions of law *de novo*. *Starr v. Gaston Cnty. Bd. of Educ.*, 191 N.C. App. 301, 305, 663 S.E.2d 322, 325 (2008). "Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Bishop v. Ingles Markets, Inc.*, ___ N.C. App. ___, ___, 756 S.E.2d 115, 118 (2014) (citation and quotation marks omitted).

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i.) Finding #2

2. Plaintiff had a significant history of treatment for back problems prior to February 8, 2012, which he failed to disclose in his discovery responses and in his testimony on direct examination at the hearing before the Deputy Commissioner. The most that Plaintiff would concede about his back at the hearing was that his back would ache from time to time due to lifting heavy tires all day, and that he saw his primary care physician, Dr. Thomas Milton Futrell, for back pain from lifting tires. In actuality, Plaintiff sought treatment multiple times for ongoing back complaints and was prescribed various medications for treatment of back pain. When Plaintiff was seen by Dr. Harrison A. Latimer for treatment of his knee on June 21, 2010, Plaintiff told Dr. Latimer that he had been treating for low back pain for the past three to four years. From December 6, 2010 to January 26, 2011, Plaintiff treated with Dr. Futrell for back pain and spasms. Dr. Futrell prescribed multiple medications to treat the back pain and ultimately referred Plaintiff to a neurologist, at Plaintiff's request.

Plaintiff first challenges the portion of finding #2 that plaintiff "had a significant history of treatment for back problems prior to February 8, 2012" as being unsupported by competent evidence. We disagree.

Dr. Dumonski initially testified that the injury on 8 February 2012 was responsible for defendant's back pain. However, he then testified that after subsequently examining medical notes from Dr. Futrell and Ms. Denton's testimony, both of which noted plaintiff's prior treatment for daily back pain occurring two years prior to 8 February 2012, "[f]rom the standpoint of causation of his back pain that [evidence] would have an impact on my thoughts regarding the causation of [plaintiff's] back pain[.]"

Dr. Wang testified that plaintiff's prior back pain for two years prior to the alleged 8 February incident was:

important information because we all base on what the patient report[s] back to us when we first saw the patient. We don't have any information regarding his previous medical history. If we don't know he had any chronic problems – and of course, his problem could be happening with th[ese] work-related injuries.

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Because the doctors testified that plaintiff's prior back issues would have been key factors in their determination of causation, the finding that plaintiff had a "significant history of treatment for back problems" is supported by competent evidence.

With regard to plaintiff's argument that the remainder of finding #2 is unsupported by competent evidence, plaintiff, in his discovery responses, failed to disclose his prior back injuries on various occasions. In plaintiff's response to Interrogatory #12, he did not mention any prior back treatment within ten years and merely disclosed a 2010 knee injury. In his response to Interrogatory #15, he stated, "[t]o the best of my recollection my only physical complaints other than my injuries sustained in my accident on February 8, 2012 are identified in Interrogatory #12." Plaintiff's response to Interrogatory #16 stated, "[t]o the best of my recollection, I have had no other physical problems, illnesses, injuries or other complaints involving the same parts of my body that are a result of my accident on February 8, 2012."

In Requests For Production of Documents #4, plaintiff responded he "has not injured his back prior to this work related injury, and as such, no prior [medical] records exist." During direct examination, plaintiff also consistently denied the extent of his prior history of treatment for back problems:

PLAINTIFF'S ATTORNEY: Okay. Had you ever received any types of medical treatment for any types of back pain?

PLAINTIFF: I think one time before that I had – was having headaches. They sent me to the doctor. And one time before, you know, I said something about my back was kind of hurting me a little bit, and he gave me muscle relaxers for it then. But, you know, ever since then, I ain't [sic] never been to the doctor for my back or nothing [sic].

...

PLAINTIFF'S ATTORNEY: Okay. And if the medical records reflected that you went a few times, would that – would you agree with that?

PLAINTIFF: For my back?

PLAINTIFF'S ATTORNEY: Right.

PLAINTIFF: No. I don't remember going a few times for my back.

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PLAINTIFF'S ATTORNEY: Did you receive a referral from them for – for your back–

PLAINTIFF: No.

PLAINTIFF'S ATTORNEY: – for back treatment? If the medical records reflect that you were actually referred to see a treatment facility called Neuroscience Center, do you – does that ring a bell to you?

PLAINTIFF: No.

Plaintiff also denied having any prior treatment other than obtaining muscle relaxers from Dr. Futrell on a singular occasion and attributed his prior back pain to “lift[ing] tires and wheels all day.”

Contrary to plaintiff's testimony, the medical records (stipulated as admitted evidence) reflect Dr. Harrison A. Latimer's notations that plaintiff received treatment for lower back pain for three or four years prior to 21 June 2010. Moreover, defendant saw Dr. Futrell on multiple occasions for back pain. On 6 December 2010, plaintiff complained of back spasms and received a muscle relaxer and narcotic medicine to relieve the pain. On 4 January 2011, plaintiff returned to Dr. Futrell and said “he was having a lot of trouble with his back[.]” Dr. Futrell prescribed plaintiff with different medication, but it failed to work effectively. Plaintiff saw Dr. Futrell on 26 January 2011 and requested to see a specialist. After that appointment, Dr. Futrell recommended that plaintiff see a neurologist, and plaintiff scheduled a consult with the Johnson Neurological Clinic.

Based on the foregoing discussion, the Commission's finding of fact #2 is supported by competent evidence.

ii.) Finding #4

4. Mr. Branson testified that he recalls Plaintiff telling him on February 8, 2012 that his back was sore and that he would probably have to go to the doctor, but that Plaintiff did not tell him that he had injured his back or neck at work.

Plaintiff appears to challenge this finding of fact by arguing the Commission failed to address Mr. Branson's ensuing testimony that Mr. Branson: 1.) did not recall hearing plaintiff say he sustained the injury by “lifting up a tire” and 2.) he did not “know what actually occurred that day at the time.” Plaintiff essentially asks us to reweigh Mr. Branson's testimony and does not contend the finding of fact relating to Mr. Branson's

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testimony is unsupported by competent evidence. Notwithstanding plaintiff's impermissible contentions, our review of the record indicates that this finding is supported by Mr. Branson's testimony. *See id.* at ___, 756 S.E.2d at 119 ("[T]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there may be evidence that would support findings to the contrary.").

iii.) Finding # 8

8. Patti Branson handles all the bookkeeping and benefits for Defendant-Employer. Despite having dealt with Mrs. Branson with regard to an earlier workers' compensation claim involving an injury to his knee on June 14, 2010, Plaintiff did not contact Mrs. Branson about his alleged February 8, 2012 back injury.

Plaintiff does not argue that finding #8 is unsupported by competent evidence. Plaintiff does not even contest that he did not contact Mrs. Branson about the alleged injury. Rather, plaintiff points to other evidence in the record to explain why he did not contact Mrs. Branson directly. Thus, this finding is binding on appeal. We also note that after reviewing the record, this finding is supported by competent evidence in the form of Mrs. Branson's testimony.

iv.) Finding #9

Plaintiff argues that a portion of the Commission's finding #9, "Plaintiff did not report any complaints of neck pain to Dr. Dumonski[.]" is not supported by competent evidence. We disagree.

Dr. Dumonski evaluated plaintiff on 10 March 2012 and testified that plaintiff "did not complain of neck pain" and any conclusion as to the causal connection between plaintiff's pain and the alleged incident on 8 February 2012 was "specific just to back pain and not neck pain[.]" He further stated, "[plaintiff] and I did not discuss his neck. I didn't get x-rays of his neck. I didn't review an MRI of his neck until just now, and . . . I've sort of been out of the loop with the treatment of his neck[.]"

Plaintiff also argues that the remaining portion of finding #9, "Plaintiff did not tell any of the doctors about his preexisting back problems, and these doctors relied on Plaintiff's inaccurate and incomplete medical history when giving their initial opinions regarding causation in this case[.]" is unsupported by competent evidence. We disagree.

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As previously mentioned, Dr. Dumonski initially testified that the alleged injury on 8 February 2012 was responsible for defendant's back pain. However, he premised his medical opinion, in part, on the assumption that plaintiff had no previous back pain before that date. Defendant's attorney asked Dr. Dumonski to review Dr. Futrell's notes and Ms. Denton's testimony regarding plaintiff's treatment for prior back pain. Dr. Dumonski testified that in light of this new information he had not previously considered, "[f]rom the standpoint of causation of his back pain that would have an impact on my thoughts regarding the causation of his back pain[.]"

Dr. Wang testified that he evaluated plaintiff on 12 March 2012 based on plaintiff's alleged work-related injury occurring on 8 February 2012. Plaintiff did not mention his previous back pain. The only information regarding the back pain, according to Dr. Wang, was provided by plaintiff because Dr. Wang did not "have any [other] information regarding his previous medical history." Dr. Wang testified that "[i]f we don't know he had any chronic problems . . . this information [is] important to be known[.]"

After evaluating plaintiff on 14 December 2012, Dr. Runheim concluded to a reasonable degree of medical certainty that more likely than not, the alleged injury of 8 February 2012 significantly contributed to plaintiff's back pain. However, he testified that he did not know plaintiff had daily back pain for two years prior to 8 February 2012. Defendants' counsel asked Dr. Runheim to look at Dr. Futrell's notes regarding plaintiff's prior treatment for back pain, and he testified that the information in Dr. Futrell's notes was different from his conversations with plaintiff because "[plaintiff] did not talk about any prior back pain with me." When asked whether the additional medical evidence added doubt to his causation conclusion, Dr. Runheim stated:

Well, prior to this, from what I'm taking part of today, the only thing I've seen is nonradiating back pain previous to this injury in February 2012, and whether or not that was radicular or not—or whether that was radiculopathy or not, I have no idea. It was nonradiating, so I mean I'm just not going to comment on that because there's no way for me to know[.]

Based on the foregoing evidence, the Commission's finding of fact #9 is supported by competent evidence.

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v.) Finding # 10

Plaintiff challenges finding #10, “Dr. Wang testified that his diagnosis of degenerative disc disease could correlate with Plaintiff’s complaints of ongoing back pain, and that based upon the imaging studies alone, Plaintiff’s complaints were ‘more like a chronic process’ than an acute injury.” Plaintiff argues this finding is unsupported by competent evidence. We disagree.

Defendants’ attorney asked Dr. Wang whether “the diagnosis of degenerative joint disease or degenerative disc disease correlate with [plaintiff]’s ongoing back pain for the last two years” and Dr. Wang replied, “[t]hat could be.” With regard to plaintiff’s complaints being a chronic process, Dr. Wang testified that “[i]f only based on the [MRI] imaging . . . it’s more like a chronic process.” Thus, Dr. Wang’s testimony constitutes competent evidence to support the Commission’s finding #10.

vi.) Finding #11

Plaintiff argues no competent evidence in the record exists to support the portion of the Commission’s finding #11 that “Plaintiff’s testimony that he sustained an injury to his neck and back at work on February 8, 2012 is not accepted as credible.” We disagree.

Plaintiff’s own testimony and his answers to interrogatories, when compared with Ms. Denton’s testimony and plaintiff’s documented history of treatment for back problems cast doubt as to whether a work-related injury on 8 February 2012 occurred. Thus, the Commission’s finding of fact with regard to plaintiff’s credibility remains undisturbed.

b.) Weight to Witnesses

Next, plaintiff argues that the Commission erred by placing more weight on purported medical causation testimony of Ms. Denton over the testimony of Drs. Dumonski, Wang, and Runheim. We disagree.

Plaintiff mischaracterizes the findings related to Ms. Denton’s testimony as medical causation testimony. In finding #11, the Commission stated that it did not find plaintiff’s testimony credible and “places greater weight on the testimony of . . . Nurse Denton.” With regard to Ms. Denton’s testimony, the Commission found:

6. On February 9, 2012, Plaintiff sought medical treatment at Medzone, where he was seen by Martha Jo Denton, RN, a nurse practitioner. Plaintiff reported to Ms. Denton that he had suffered daily back pain for the past

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two years, but that it had worsened within the last two days and that he now had radiating pain down the back of his legs. Ms. Denton asked Plaintiff if his back pain occurred from a specific injury or incident. She testified that Plaintiff responded ‘[n]o, that he could not relate it back to a specific incident but that, you know, he did work lifting heavy tires all day long, but that he could not relate it back to a specific incident.’ When Plaintiff returned to see Ms. Denton on February 15, 2012, he again gave no indication that his back pain was the result of an injury or specific incident at work.

...

11. To the extent that Plaintiff’s wife . . . and Plaintiff’s life-long friend . . . testified that Plaintiff told them he was injured at work, the Full Commission places greater weight on the testimony of Mr. and Mrs. Branson and the records and testimony of Nurse Denton.

Thus, the Commission’s findings related to Ms. Denton’s lay testimony indicate that plaintiff failed to report that he injured his back at work on 8 February 2012. The Commission, within its discretion, placed more weight on Ms. Denton’s testimony than plaintiff’s wife and friend’s statements that plaintiff told them he was injured at work.

Additionally, the Commission considered the expert testimony of Drs. Dumonski, Wang, and Runheim but found, based on competent evidence previously discussed, that “these doctors relied on Plaintiff’s inaccurate and incomplete medical history when giving their initial opinions regarding causation in this case.” As such, the Commission was free to assign as little or as much weight to the doctors’ testimony in concluding that plaintiff did not sustain as an injury to his back as a result of work-related injury on 8 February 2012. *See Harrell v. J. P. Stevens & Co., Inc.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (1980) (“[T]he Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness’s testimony[.]”). Thus, plaintiff’s argument fails.

c.) Reliance on Dr. Futrell’s Testimony

Plaintiff argues the Commission erred in its finding of fact #10 by considering Dr. Futrell’s purported non-competent testimony that “it was possible that the degenerative changes shown on the MRI [after 8 February 2012] were causing the back pain Plaintiff was experiencing when he treated Plaintiff in 2010 and 2011.”

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Assuming *arguendo* the Commission erred by considering Dr. Futrell's testimony above, any such error is not prejudicial to plaintiff. After reviewing the Commission's Opinion and Award, its decision to deny plaintiff's claim for benefits hinged on plaintiff's non-credible testimony, plaintiff's failure to disclose his prior back problems, plaintiff's failure to report a work-related injury to Ms. Denton or the Bransons, and the doctors' reliance on plaintiff's incomplete medical history.

Thus, the Commission's consideration of Dr. Futrell's testimony above was not prejudicial error because that portion of his testimony was not material to the outcome of this case. *See Estate of Gainey v. S. Flooring & Acoustical Co., Inc.*, 184 N.C. App. 497, 503, 646 S.E.2d 604, 608 (2007) ("[W]here there are sufficient findings of fact based on competent evidence to support the [tribunal's] conclusions of law, the [decision] will not be disturbed because of other erroneous findings which do not affect the conclusions.").

d.) Form 44

Plaintiff argues that defendants' challenges to the Deputy Commissioner's conclusions of law #1, #2, #3, and #5 on the Form 44 were not properly before the Commission. Plaintiff avers, purely from a procedural standpoint, that defendants' "failure to assign error with specificity, coupled with the Commission's sparse Opinion and Award, results in portions of Deputy Commissioner Ledford's original decision being binding." We disagree.

Rule 701 of the Workers' Compensation Rules of the North Carolina Industrial Commission states:

(2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant a Form 44 Application for Review upon which appellant must state the grounds for the appeal. The grounds must be stated with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded. Failure to state with particularity the grounds for appeal shall result in abandonment of such grounds, as provided in paragraph (3). . . .

(3) Particular grounds for appeal not set forth in the application for review shall be deemed abandoned, and argument thereon shall not be heard before the Full Commission.

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Adcox v. Clarkson Bros. Const. Co., ___ N.C. App. ___, ___, 763 S.E.2d 792, 796-97 (2014). Our Court has stressed that “the portion of Rule 701 requiring appellant to state with particularity the grounds for appeal may not be waived by the Full Commission.” *Roberts v. Wal-Mart Stores, Inc.*, 173 N.C. App. 740, 744, 619 S.E.2d 907, 910 (2005). Accordingly, “the penalty for non-compliance with the particularity requirement is waiver of the grounds, and, where no grounds are stated, the appeal is abandoned.” *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 249, 652 S.E.2d 713, 715 (2007). We determine whether the Commission abused its discretion by not ruling that defendants waived issues by violating Rule 701 through our consideration of “whether the appellant provided the appellee with adequate notice of the grounds for appeal through other means such as addressing the issue in its brief to the Full Commission” and whether the Commission addressed the issues raised by appellants in its Opinion and Award. *Adcox*, ___ N.C. App. at ___, 763 S.E.2d at 798.

For the reasons set forth below, even if defendants’ assignments of error in their Form 44 lacked the requisite specificity under Rule 701, the Commission did not abuse its discretion by failing to deem defendants’ issues as waived. Defendants assigned error to the Deputy Commissioner’s conclusions of law #1, #2, #3, and #5 in their Form 44 by stating, with respect to each challenged conclusion: “Error is assigned to Conclusion of Law No. [x], as this conclusion is contrary to law, omits salient facts, and is not adequately supported by findings of fact which are supported by the competent evidence in the Record.”

The Deputy Commissioner’s conclusion of law #1 states that “Plaintiff sustained an injury by accident in the form of a specific traumatic incident arising out of and in the course of his employment with the Defendant-employer[.]” Conclusion of law #2 states that “as a consequence of the accident of February 8, 2012, Plaintiff sustained significant aggravation of his pre-existing underlying degenerative disc disease in this lower back[.] . . . [A]ll the consequences of the accident . . . are compensable[.]” Conclusion of law #3 states that “[plaintiff] is found to be a credible witness.” Conclusion of law #5 entitled plaintiff to “compensation for temporary total disability” because he “met his burden of proving he is disabled due to the injury by accident[.]”

In reversing the Deputy Commissioner, the Full Commission specifically reviewed and considered “the briefs . . . of the parties[.]” As a result, the Commission concluded that “Plaintiff did not sustain an injury by accident or suffer an injury to his back as a result of a specific traumatic incident of the work assigned, on February 8, 2012[.]” “Plaintiff’s claim for benefits . . . must be denied[.]” and “Plaintiff’s testimony . . . is

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not accepted as credible.” Thus, the Commission’s conclusions of law directly addressed the issues raised by defendants’ in their Form 44 and brief. As such, plaintiff cannot and does not contend that he received inadequate notice of defendants’ grounds for appeal—the underlying consideration behind the spirit of Rule 701. Thus, plaintiff’s argument fails. *See Cooper v. BHT Enterprises*, 195 N.C. App. 363, 368-69, 672 S.E.2d 748, 753 (2009) (holding that defendants “complied with Rule 701(2)’s requirement to state the grounds for appeal with particularity by timely filing their brief after giving notice of their appeal to the Full Commission” and taking into account the fact that plaintiff did not argue that defendant’s Form 44 provided inadequate notice of their grounds for appeal).

e.) Findings of Fact not Challenged by Defendants

Plaintiff argues that defendants failed to properly assign error to several findings of fact made by the Deputy Commissioner in its Form 44. Accordingly, he contends that these findings are binding on appeal. We disagree.

Although we are limited to determining whether competent evidence supports the Commission’s findings of fact and whether those findings support the Commission’s conclusions of law, the Deputy Commissioner’s Opinion and Award “is fully reviewable upon appeal to the Full Commission.” *Strezinski v. City of Greensboro*, 187 N.C. App. 703, 709, 654 S.E.2d 263, 267 (2007). The Commission “may weigh the same evidence that was presented to the deputy commissioner and decide for itself the weight and credibility of that evidence.” *Id.* Importantly, the Commission has the authority to “strike entirely the deputy commissioner’s findings of fact even if no exception was taken to them.” *Id.* Because the Commission could reject, adopt, or modify the Deputy Commissioner’s findings of fact, plaintiff’s argument fails.

III.) Conclusion

In sum, the challenged findings of fact are supported by competent evidence. Any error arising from the Commission’s reliance on Dr. Futrell’s testimony is not prejudicial. Finally, the Commission neither erred by placing more weight on Ms. Denton’s testimony nor by failing to deem the Deputy Commissioner’s legal conclusions and findings of fact as binding. Accordingly, we affirm the Full Commission’s Opinion and Award.

Affirmed.

Judges GEER and INMAN concur.

STATE v. HOLE

[240 N.C. App. 537 (2015)]

STATE OF NORTH CAROLINA

v.

BRIAN PHILIP HOLE

No. COA14-1142

Filed 21 April 2015

1. Larceny—of a motor vehicle—jury instruction—voluntary intoxication

In defendant's trial resulting in his conviction for larceny of a motor vehicle, the trial court did not commit plain error by failing to instruct the jury on the lesser-included offense of unauthorized use of a motor vehicle. Because the trial court properly instructed the jury on the issue of voluntary intoxication, defendant could not show that the jury probably would have reached a different result if it had also received the instruction on unauthorized use of a motor vehicle.

2. Larceny—of a motor vehicle—ineffective assistance of counsel—dismissed

On appeal from his conviction for larceny of a motor vehicle, defendant's ineffective assistance of counsel claim was dismissed without prejudice. Ineffective assistance of counsel claims should be asserted through a motion for appropriate relief, which allows development of an adequate factual record to determine the reasonableness of trial counsel's conduct.

Appeal by defendant from judgment entered 29 May 2014 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 4 March 2015.

Attorney General Roy Cooper, by Assistant Attorney General Richard G. Sowerby, for the State.

Amanda S. Zimmer, for defendant.

TYSON, Judge.

Brian Philip Hole ("Defendant") appeals from judgment entered, following his conviction of larceny of a motor vehicle. We hold the trial court did not commit plain error. We dismiss Defendant's ineffective assistance of counsel claim, without prejudice.

STATE v. HOLE

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I. Background

Defendant began drinking beer at 7:00 a.m. on 12 May 2013. He arrived at the Double K Bar between 7:00 p.m. and 8:00 p.m. and continued to consume beer. A patron of the bar, John Staten, played a game of pool with defendant. Staten testified that Defendant appeared to be very intoxicated. By 8:45 p.m., Mr. Staten noticed Defendant was having difficulty standing and he leaned against a drink machine.

Emily Story was also a patron in the Double K Bar that evening. She drove her 1986 Chevrolet Blazer to the bar, left the keys in the ignition, and went inside. Story testified her Blazer had large, thirty-eight inch tires, and was raised two feet from the ground. She had to grasp the steering wheel or seat belt to pull herself into the vehicle.

Story had been inside the bar about thirty minutes when she heard her vehicle crank. She went to the door and saw Defendant drive away in her Blazer. Story's boyfriend, Joe Graves, and Graves' friend, Samuel Turner, immediately got into Graves' truck and followed Defendant.

Defendant attempted to turn and drove into a ditch. He was able to drive the Blazer out of the ditch and continued driving down the road, with Graves and Turner following behind. As Defendant came to a sharp curve, he drove off the road, traveled about 500 yards through a field, and crashed into a barn. Hayes and Turner left their truck and walked through the field to the barn. Defendant was unconscious and lying in the floorboard of Story's vehicle.

Defendant was transported by ambulance to Moses Cone Memorial Hospital in Greensboro and arrived in the emergency room at 11:40 p.m. Defendant called Dr. Brian Opitz, the emergency room physician who treated him, to testify at trial. Dr. Opitz testified that Defendant registered a blood alcohol level of .334 at 11:51 p.m. Defendant was offered beer at the hospital to prevent symptoms of alcohol withdrawal, but refused.

Dr. Opitz evaluated Defendant using the Glasgow Coma Scale ("GCS") as part of his medical treatment. The GCS is a scale used by emergency medicine practitioners to determine how trauma may have affected the patient's mental function. The GCS ranges from 3 to 15 and a score of 15 is normal. Dr. Opitz explained that the first component of the test involves the patient's eyes. Four points are assessed if the patient opens his eyes normally when he is approached and spoken to. The patient is assessed one point, if he cannot respond by opening his eyes.

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The second component involves verbal communication. Five points are assessed if the patient is able to speak normally and coherently. One point is assessed if the patient cannot speak at all. The final component tests the patient's fine motor skills. Six points are assessed if the patient is able to follow commands to perform fine motor movements. He will be assessed one point if he cannot do anything at all.

The EMS team evaluated defendant using the GCS and determined he scored 11 out of the 15 possible points. When Dr. Opitz evaluated him, defendant scored 13 points. Dr. Opitz testified he assessed 3 points for the eye component of the test and 4 points for the verbal component. Dr. Opitz scored Defendant with 6 points, a perfect score, on the fine motor skills portion of the test.

Defendant was indicted on the charge of felonious larceny of a motor vehicle. He was tried before a jury and convicted on 29 May 2014. The trial court sentenced Defendant to an active prison term of fifteen to twenty-seven months. Defendant appeals.

II. Issues

Defendant argues: (1) the trial court committed plain error by failing to instruct the jury on the lesser-included offense of unauthorized use of a motor vehicle; and, (2) his trial counsel was ineffective by failing to request a jury instruction on the lesser-included offense of unauthorized use of a motor vehicle.

III. Jury Instruction

[1] Defendant argues the trial court committed plain error by failing to instruct the jury on the offense of unauthorized use of a motor vehicle. He contends unauthorized use of a motor vehicle is a lesser-included offense of larceny. Defendant also contends the evidence showed he was too intoxicated to form the requisite intent to support a conviction of felonious larceny. We disagree.

a. Standard of Review

Defendant failed to object to the jury instructions provided at trial. We review unpreserved error in criminal cases under a plain error standard. N.C.R. App. P. 10(a)(4); *State v. Black*, 308 N.C. 736, 739-41, 303 S.E.2d 804, 805-07 (1983). Under the plain error standard, the defendant must establish “the error had a probable impact on the jury’s finding that the defendant was guilty.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and quotation marks omitted). “[B]ecause plain error is to be applied cautiously and only in the

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exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]” *Id.* (citation and quotation marks omitted). In reviewing for plain error, appellate courts are to “examine the entire record and determine if the instructional error had a probable impact on the jury’s finding of guilt.” *State v. Odom*, 307 N.C. 655, 661, 300 S.E. 2d 375, 379 (1983).

b. Unauthorized Use of a Motor Vehicle

A person is guilty of unauthorized use of a motor vehicle, a Class 1 misdemeanor, if he takes or operates a motor vehicle without the express or implied consent of the owner or person in lawful possession. N.C. Gen. Stat. § 14-72.2(a) and (b) (2013). “The essential elements of larceny are that defendant (1) took the property of another; (2) carried it away; (3) without the owner’s consent; and (4) with the intent to permanently deprive the owner of the property.” *State v. Coats*, 74 N.C. App. 110, 112, 327 S.E.2d 298, 300, *cert. denied*, 314 N.C. 118, 332 S.E.2d 492 (1985) (citing *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982)). When the value of the property stolen exceeds \$1,000, the larceny in question is classified as a Class H felony. N.C. Gen. Stat. § 14-72(a) (2013). The offense of larceny requires the State to prove the defendant possessed the intent to permanently deprive the owner of the property, while the offense of unauthorized use of a motor vehicle does not.

A trial court must instruct the jury on a lesser-included offense, if there is evidence the defendant might be guilty of the lesser-included offense. *State v. Collins*, 334 N.C. 54, 58, 431 S.E.2d 188, 190-91 (1993). “If the State’s evidence is clear and positive as to each element of the charged offense, and if there is no evidence of the lesser-included offense, there is no error in refusing to instruct on the lesser offense.” *State v. Howie*, 116 N.C. App. 609, 613, 448 S.E.2d 867, 869 (1994) (citing *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985)).

Our Court has held unauthorized use of a motor vehicle “may be a lesser-included offense of larceny where there is evidence to support the charge.” *State v. Ross*, 46 N.C. App. 338, 339, 264 S.E.2d 742, 743 (1980); *State v. McRae*, 58 N.C. App. 225, 229, 292 S.E.2d 778, 780 (1982). *But see State v. Nickerson*, 365 N.C. 279, 282, 715 S.E.2d 845, 847 (2011) (holding unauthorized use of a motor vehicle is not a lesser-included offense of possession of stolen goods because unauthorized use of motor vehicle requires the State to prove the property in question is a “motor-propelled conveyance,” an element not found in the definition of possession of stolen goods).

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c. Voluntary Intoxication and Specific Intent

“Voluntary intoxication may negate the existence of specific intent as an essential element of a crime.” *Howie*, 116 N.C. App at 613, 448 S.E.2d at 869. Evidence of defendant’s intoxication at the time of the crime may support an instruction on the lesser-included offense, which requires no specific intent, in addition to an instruction on larceny. *Id.* at 613, 448 S.E.2d at 869-70 (citing *Peacock*, 313 N.C. at 560, 330 S.E.2d at 194).

“In order for intoxication to negate the existence of specific intent, the evidence must show the defendant was ‘utterly incapable’ of forming the requisite intent.” *Id.* at 613, 448 S.E.2d at 869-70 (citation omitted). “Evidence of mere intoxication is insufficient to meet this burden.” *Id.* If the evidence showed defendant was “utterly incapable” to form the intent to commit larceny, the trial court should instruct the jury on the lesser-included offense. *Id.*

Defendant asserted he was too intoxicated to form the requisite intent to commit larceny. The court instructed the jury on voluntary intoxication, as follows:

You may find that there is evidence which tends to show that the defendant was intoxicated at the time of the acts alleged in this case. Generally, voluntary intoxication is not a legal excuse for a crime. However, if you find that the defendant was intoxicated, you should consider whether this condition affected the defendant’s ability to formulate the specific intent which is required for conviction of felonious larceny.

In order for you to find the defendant guilty of felonious larceny, you must find beyond a reasonable doubt that the defendant had the specific intent required to commit this crime, as I have previously instructed you. If, as a result of intoxication, the defendant did not have the required specific intent, you must find the defendant not guilty of felonious larceny.

Therefore, I charge that if, upon considering the evidence with respect to the defendant’s intoxication, you have a reasonable doubt as to whether the defendant formulated a specific intent required for conviction of felonious larceny, you will not return a verdict of guilty of felonious larceny and must find the defendant not guilty.

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The trial court properly instructed the jury on the issue of voluntary intoxication. Under plain error review and in light of this instruction, defendant has not shown the absence of an instruction on unauthorized use of a motor vehicle impacted the jury's larceny verdict. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Whether defendant possessed the intent to permanently deprive the owner of the vehicle was a question of fact to be found by the jury. The jury heard Dr. Opitz's testimony and had EMS and Dr. Opitz's evaluations of Defendant's mental functioning and intoxication at the hospital shortly after the wreck. After receiving the proper instruction, the jury found the element of defendant's intent to commit larceny beyond a reasonable doubt. Defendant has not shown the jury probably would have reached a different result, if the trial court had given an additional instruction on unauthorized use of a motor vehicle. The trial court did not commit plain error in failing to instruct the jury on unauthorized use of a motor vehicle. Defendant's argument is overruled.

IV. Ineffective Assistance of Counsel

[2] Defendant argues he received ineffective assistance of counsel because his attorney failed to request an instruction on the lesser-included offense of unauthorized use of a motor vehicle. He asserts there is a reasonable probability the jury would have acquitted him of larceny, if the jury had been instructed on the lesser-included offense of unauthorized use of a motor vehicle.

The defendant must demonstrate his "counsel's conduct fell below an objective standard of reasonableness" to obtain relief for ineffective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, *reh'g denied*, 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984)). Precedents require defendant to show: (1) "counsel's performance was deficient;" and, (2) "that the deficient performance prejudiced his defense." *Id.* at 562, 324 S.E.2d at 248. Judicial scrutiny of trial counsel's performance is highly deferential.

Trial counsel is given wide latitude in discretionary matters of trial strategy. *State v. Milano*, 297 N.C. 485, 495-96, 256 S.E.2d 154, 160 (1979) (citation and quotation omitted), *overruled on other grounds by State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983). An appellate court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Mason*, 337 N.C. 165, 178, 446 S.E.2d 58, 65 (1994) (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694).

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In a recent decision, this Court thoroughly discussed the preference for litigating ineffective assistance of counsel claims before the trial court, as opposed to the appellate courts:

The preference for the assertion of ineffective assistance of counsel claims in postconviction proceedings rather than on direct appeal inherent in numerous decisions by this Court and the Supreme Court stems from the fact that evidence concerning the nature and extent of the information available to the defendant's trial counsel at the time that certain decisions were made and the fact that information concerning any discussions that took place between the defendant and his or her trial counsel, while needed in evaluating the validity of the ineffective assistance of counsel claim under consideration, are generally not contained in the record presented to a reviewing court on direct appeal.

State v. Pemberton, __ N.C. App. __, __, 743 S.E.2d 719, 725 (2013).

On the record before us, this Court can only speculate to whether defense counsel's failure to request a jury instruction on unauthorized use of a motor vehicle constituted a reasonable trial strategy. *Id.* at __, 743 S.E.2d at 727. In cases such as this, "ineffective assistance of counsel claim[s] should be asserted through the filing and litigation of a motion for appropriate relief, during the course of which an adequate factual record can be developed, rather than during the course of a direct appeal." *Id.* at __, 743 S.E.2d at 725. We dismiss Defendant's ineffective assistance of counsel claim, without prejudice to Defendant's right to assert the claim in the trial court.

V. Conclusion

Defendant has failed to show the trial court committed plain error in failing to instruct the jury on the offense of unauthorized use of a motor vehicle, a lesser-included offense of larceny. The jury was instructed on voluntary intoxication, heard all the evidence, and found Defendant to be guilty of larceny.

Defendant's ineffective assistance of counsel claim is dismissed, without prejudice to Defendant's right to assert the claim in the trial court.

NO ERROR IN PART, DISMISSED IN PART.

Judges STEPHENS and HUNTER, Jr. concur.

STATE v. HUCKELBA

[240 N.C. App. 544 (2015)]

STATE OF NORTH CAROLINA

v.

ANNA LAURA HUCKELBA

No. COA14-916

Filed 21 April 2015

1. Schools and Education—possession of weapon on educational property—jury instruction—knowingly on educational property

The trial court committed plain error by instructing the jury that defendant was guilty of possessing a weapon on educational property even if she did not know she was on educational property. The State bears the burden of proving a defendant's mental state not only for the "possess or carry" element of the statute, but also for the knowing presence on educational property element.

2. Constitutional Law—effective assistance of counsel—failure to argue fatal variance in indictment—improper school address—surplusage

The trial court did not err in a possession of a weapon on educational property case by concluding that defendant did not receive ineffective assistance of counsel based on his failure to argue a fatal variance in the indictment regarding an improper school address. The indictment charged all of the essential elements of the crime and the physical address for High Point University listed in the indictment was surplusage. The indictment already described the educational property element as High Point University.

BRYANT, Judge, concurring in part and dissenting in part.

Appeal by Defendant from judgment entered on 3 October 2013 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals on 20 January 2015.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.

Edward Eldred for the defendant-appellant.

HUNTER, JR., Robert N., Judge.

STATE v. HUCKELBA

[240 N.C. App. 544 (2015)]

Anna Laura Huckelba¹ (“Defendant”) appeals from a final judgment of the trial court, based on a jury verdict finding her guilty of three counts of misdemeanor weapon on educational property and one count of felony weapon on educational property pursuant to N.C. Gen. Stat. § 14-269.2(b) (2011). On appeal, Defendant first contends that the trial court committed plain error by instructing the jury that Defendant was guilty of possessing a weapon on educational property even if she did not know she was on educational property. Second, Defendant argues that her trial counsel was ineffective by failing to argue a fatal variance in the indictment. For the following reasons, we reverse and remand for a new trial consistent with this opinion.

I. Factual & Procedural History

On 11 February 2013, Defendant was indicted on three counts of misdemeanor possession of a weapon on campus or other educational property and one count of felony possession of a weapon on campus or other educational property in violation of N.C. Gen. Stat. § 14-269.2(b). Defendant’s case was called for trial in Guilford County Superior Court on 1 October 2013. The evidence presented at trial tended to show the following facts:

On 25 December 2012, Defendant was a senior at High Point University in High Point, North Carolina. Because it was Christmas day, school was not in session, and there were few cars on campus. That evening, sometime after 4:30 P.M., Defendant pulled into a parking spot in front of High Point University’s Administration Building. In order to get to this parking spot, Defendant had to drive past a fence, but she did not have to drive through any security gates. Had Defendant chosen to move her car from its location in front of the Administration Building to the residential area of campus, she would have encountered a security gate, and would need a security card to drive into the residences. Instead, Defendant parked her car in an area that was open to the public, approximately two miles away from “main” campus, where most of the academic buildings are located.

Officer Jeffrey Thomas (“Officer Thomas”), a security officer employed by High Point University, noticed Defendant as she parked. Officer Thomas recognized Defendant because the officers were previously instructed to “be on the lookout” for Defendant for an unspecified

1. Although the caption on Defendant’s brief and the Record on Appeal spell Defendant’s name “Huckleba,” the filings with the trial court (including the indictments and judgment) spell Defendant’s name “Huckelba.” We adopt the spelling of Defendant’s name used by the trial court in the judgment.

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reason. The officers were directed to call a Student Life employee if they saw Defendant on campus. Officer Thomas approached Defendant and spoke to her while she was still in her car. He asked her whether she had spoken to anyone in the Student Life department. When Defendant responded that she had not, Officer Thomas escorted her into the lobby of the Administration Building. Defendant's demeanor was calm. Officer Thomas left Defendant in the lobby and Lieutenant Dennis Shumaker ("Lieutenant Shumaker"), another security officer employed by High Point University, joined them in the lobby.

Lieutenant Shumaker contacted the on-duty resident director of Student Life, Lance Dunlap ("Mr. Dunlap"), who arrived at the Administration Building ten to fifteen minutes later. During those ten to fifteen minutes, Lieutenant Shumaker asked Defendant why she was on campus. Defendant responded that she wanted to do her laundry in her townhome-style dorm room on campus. When Mr. Dunlap arrived, he asked Defendant if she had a gun. Defendant responded that she did have a gun in her car. Lieutenant Shumaker told Defendant that he needed to retrieve the gun from her car. Defendant handed Lieutenant Shumaker her car keys without objection. Before Lieutenant Shumaker left the room, Defendant told him that she had a "concealed carry" permit.

Lieutenant Shumaker went outside to the parking lot of the Administration Building, unlocked and opened Defendant's car. Initially, Lieutenant Shumaker did not see any weapons in the car, only a cardboard box on the back-seat floorboard. Lieutenant Shumaker eventually located a loaded gun² in the glove compartment of Defendant's car and three knives in the cardboard box in the back seat. The knives' blades were not exposed. At that point, Lieutenant Shumaker contacted the High Point Police Department and waited for an officer to arrive on the scene. Before leaving for the night, Lieutenant Shumaker wrote a report of the incident. In that report, he documented a direct statement made by Defendant: "I know I'm not supposed to have [the gun] on campus, but I don't take it in my room, or anything."

High Point Police Officer Ian Stanick ("Officer Stanick") eventually arrived on the scene and immediately secured the weapons in his police vehicle. He later took the weapons to the police department and logged them into evidence. Once the weapons were secure, Officer Stanick arrested Defendant and transported her to the police station. At the station, Defendant waived her *Miranda* rights and made several

2. The gun was later identified by police as a Ruger 380 pistol.

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statements to Officer Stanick about the weapons in her car. Defendant stated again that “[s]he knew she was not supposed to have a gun on campus” because “she was taught that in her concealed carry class.” She also indicated that her concealed carry permit was valid on the day of her arrest.³ Defendant told Officer Stanick that she bought the gun for protection because she works the night shift at a retail clothing store in Winston-Salem. She explained to Officer Stanick that she does not feel safe walking through the dark parking lot after work. Defendant indicated to Officer Stanick that “she did not have anywhere else to keep the weapon so she kept it locked in the glove compartment of the car.” Defendant was subsequently charged with one count of felony weapon on educational property for the gun and three counts of misdemeanor weapon on educational property for the knives. She spent thirty-nine days in jail before she was released on bail.

Defendant’s case was called for trial in Guilford County Superior Court on 1 October 2013. During her opening statements to the jury, Defendant admitted to the element of possession for each of the four weapons charges, but adamantly denied that she was on educational property. At the close of the State’s evidence, Defendant made a motion to dismiss, which the trial court denied. No evidence was presented by Defendant.

During the charge conference, outside the presence of the jury, the trial court proposed to read to the jury North Carolina Pattern Jury Instruction 235.17 for the substantive elements of the offenses charged. Neither party objected. Accordingly, the trial court charged the jury with the following instructions:

The defendant in this case has been charged with knowingly possessing a Ruger pistol on educational property.

For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt:

First, that the defendant knowingly possessed a Ruger pistol.

3. The evidence suggests that Defendant had a valid permit to carry a concealed handgun at the time of her arrest. We note that had the same incident occurred nine months later, Defendant would have been guilty of no crime—at least with regard to the felony gun charge. Effective 1 October 2013, the North Carolina legislature added the following exemption to the statute prohibiting weapons on educational property: “The provisions of this section shall not apply to a person who has a concealed handgun permit that is valid . . . who has a handgun in a closed compartment or container within the person’s locked vehicle.” N.C. Gen. Stat. § 14-269.2(k) (2013).

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And second, that the defendant was on educational property at the time she possessed the pistol.

Therefore, if you, the jury, find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant knowingly possessed a Ruger pistol, and that the defendant was on educational property at the time she possessed the pistol, then it would be your duty to return a verdict of guilty of knowingly possessing a Ruger pistol on educational property. On the other hand, if you fail to so find or you have a reasonable doubt as to one or both of these things, then it would be your duty to return a verdict of not guilty as to this charge.

The trial court repeated this instruction to the jury for each additional weapon charge, substituting the words “Ruger pistol” for the names of the three knives found in Defendant’s car. The jury found Defendant guilty of all four weapons charges. At sentencing, because Defendant was a prior record level I with zero points, the trial court imposed a suspended sentence of six to seventeen months imprisonment for the Class I felony gun charge, and a suspended, consolidated sentence of forty-five days imprisonment for the misdemeanor weapons charges.

On 8 October 2013, five days after the judgment against her was entered, Defendant filed a handwritten notice of appeal. The notice states that Defendant “give[s] notice of appeal to the Court of Appeals of Guilford County.” The bottom right hand corner of the notice states: “10/8/13 CC DA,” suggesting that Defendant possibly gave the District Attorney’s office the same notice. On 4 December 2014, the State moved this Court to dismiss Defendant’s appeal, citing a violation of Rule 4 of the North Carolina Rules of Appellate Procedure, which requires a defendant-appellant to serve the State with a copy of the notice of appeal. *See* N.C. R. App. P. 4. On 15 December 2014, Defendant filed a response to the State’s motion to dismiss, as well as a petition for writ of *certiorari* with this Court. On 16 January 2015 we allowed the State’s motion to dismiss the appeal, based on the procedural violations. However, on 21 January 2015, we granted Defendant’s petition for writ of *certiorari* to decide this case on the merits.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, which provides for appellate review under the extraordinary writ of *certiorari*. “The writ of *certiorari* may be issued in appropriate circumstances by either appellate court

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to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action.” N.C. R. App. P. 21(a)(1).

III. Standard of Review

With regard to the first assignment of error, the allegedly erroneous jury instructions, “[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent.” *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). “A party may not make any portion of the jury charge or omissions therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires.” N.C. R. App. P. 10(a)(2); *see also State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999), *cert. denied*, 529 U.S. 1024 (2008). However,

[i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835 (2008). Therefore, an unpreserved issue with the jury instructions in a criminal case may only be reviewed by this Court if we find that the instructions as given by the trial court amounted to plain error. *See State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (noting that the Supreme Court of North Carolina “has elected to review unpreserved issues for plain error when they involve . . . errors in the judge’s instructions to the jury[.]”).

“The North Carolina plain error standard of review . . . requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error.” *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). First, “a defendant must demonstrate that a fundamental error occurred at trial.” *Id.* at 518, 723 S.E.2d at 334. Second, “a defendant must establish prejudice—that, after examination of the entire record, the error ‘had a probable impact on the jury’s finding that the defendant was guilty.’” *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). Finally, “because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* (quotation marks omitted).

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In this case, Defendant argues on appeal that the trial court erred by instructing the jury that Defendant was guilty of possessing a gun on educational property even if she did not know she was on educational property. Defendant did not object at trial to the proposed jury instructions; however, she now specifically and distinctly contends that the instructions amounted to plain error. Therefore, we review the trial court's instructions to the jury for plain error.

With regard to the second assignment of error, the alleged ineffective assistance of counsel, "a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (quotation marks omitted). To establish prejudice, "a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

IV. Analysis

Defendant's two arguments on appeal are: (1) the trial court committed plain error by instructing the jury that Defendant was guilty of possessing a gun on educational property even if she did not know she was on educational property; and (2) Defendant's trial counsel was ineffective by failing to argue a fatal flaw in the indictment. We address each assignment of error in turn.

A. Jury Instructions

[1] "It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989).

Here, the statute under which Defendant was convicted provides: "It shall be a class I felony for any person knowingly to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school." N.C. Gen. Stat. § 14-269.2(b) (2011). On appeal, Defendant argues that the trial court failed to instruct the jury on the proper mental state for the "on educational property" element of the crime. Specifically, Defendant argues that the trial court should have instructed the jury that it must find Defendant not guilty of the crime if it finds that Defendant was not *knowingly* on educational property.

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The issue of whether the word “knowingly,” as used in N.C. Gen. Stat. § 14-269.2(b), modifies both clauses “possess or carry” and “on educational property” is an issue of first impression for this Court. The plain language of N.C. Gen. Stat. § 14-269.2(b) provides us little guidance in determining which words in the sentence “knowingly” should modify. While the clause “whether openly or concealed” is separated from the rest of the sentence by commas, there is no punctuation separating the “knowingly to possess or carry” clause from the latter clauses in the sentence.⁴

Our Supreme Court has addressed the issue of which clauses in a statutory sentence the adverbial mental state “knowingly” should modify. However, in that case, the statutory language was much more clear than in the case at bar. In 1964, the Supreme Court of North Carolina analyzed N.C. Gen. Stat. § 18-78.1, which governed licenses to sell alcoholic beverages. *See Campbell v. North Carolina State Bd. of Alcoholic Control*, 263 N.C. 224, 225–26, 139 S.E.2d 197, 199 (1964) (overruled on other grounds by *Nat’l Food Stores v. North Carolina Bd. of Alcoholic Control*, 268 N.C. 624, 151 S.E.2d 582 (1975)). Section 5 of the statute provided that no licensee shall “sell, offer for sale, possess, or knowingly permit the consumption on the licensed premises of any kind of alcoholic liquors the sale or possession of which is not authorized by law.” N.C. Gen. Stat. § 18-78.1(5) (1966). The Supreme Court noted that “it appears by the punctuation that the word ‘knowingly’ does not modify sell, offer for sale, or possess but does modify ‘permit the consumption of the licensed premises.’” *Campbell*, 263 N.C. at 226, 139 S.E.2d at 199. This interpretation of the statute is clear from its plain language. The word “knowingly” is placed *after* the clauses “sell, offer for sale, and possess,” but *before* the clause “permit the consumption.” The statutory

4. One criminal law treatise describes this grammatical conundrum in a similarly worded statute:

Still further difficulty arises from the ambiguity which frequently exists concerning what the words or phrases in question modify. What, for instance, does “knowingly” modify in a sentence from a “blue sky” law criminal statute punishing one who “knowingly sells a security without a permit” from the securities commissioner? To be guilty must the seller of a security without a permit know only that what he is doing constitutes a sale, or must he also know that the thing he sells is a security, or must he also know that he has no permit to sell the security he sells? As a matter of grammar the statute is ambiguous; it is not at all clear how far down the sentence the word “knowingly” is intended to travel—whether it modifies “sells,” or “sells a security,” or “sells a security without a permit.”

W. LaFave & A. Scott, *Criminal Law* § 27 (1972).

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language of N.C. Gen. Stat. § 14-269.2(b) is far less clear because the modifying word “knowingly” is placed before all of the other clauses in the statutory sentence. Thus, *Campbell* provides us little guidance in our analysis of N.C. Gen. Stat. § 14-269.2(b).

Although our State court decisions provide little guidance, this issue has been raised several times in the federal courts of appeal and in the United States Supreme Court. *See, e.g., United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994); *United States v. Staples*, 511 U.S. 600 (1994); *Liparota v. United States*, 471 U.S. 419 (1985); *United States v. Figueroa*, 165 F.3d 111, 115 (2d Cir. 1998); *United States v. Langley*, 62 F.3d 602, 604 (4th Cir. 1995); *United States v. Forbes*, 64 F.3d 928 (4th Cir. 1995). Therefore, we look to these cases as persuasive authority for our inquiry. In all of the cases addressing this issue, the Courts resolve the grammatical ambiguity by looking to other principles of statutory construction.

In accordance with United States Supreme Court and Fourth Circuit cases, and our State law presumptions, we analyze N.C. Gen. Stat. § 14-269.2(b) under the following principles of statutory construction: (1) the common law presumption against criminal liability without a showing of *mens rea*; (2) the General Assembly’s intent in enacting and amending the statute; and (3) the rule of lenity. We hold under each relevant principle of statutory construction, the “knowingly” mental state in N.C. Gen. Stat. § 14-269.2(b) must modify both clauses “possess or carry” and “on educational property.”

1. Mens Rea

The first principle of statutory construction articulated by the federal courts is the common law presumption that criminal culpability requires a guilty mind, or some knowledge that the actor is performing a wrongful act.⁵ *See Staples v. United States*, 511 U.S. 600, 605 (1994) (“[W]e must construe the statute in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded.”) (internal citations omitted).

The United States Supreme Court first addressed the issue of the extent to which a mental state requirement should be “read into” a statute in *Liparota v. United States*. 471 U.S. 419 (1985). In *Liparota*, the

5. *See* 1 Wharton’s Criminal Law § 27 (15th ed. 1993) (“In the ordinary case, an evil deed, without more, does not constitute a crime; a crime is committed only if the evil doer harbored an evil mind.”).

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defendant was convicted under a federal statute which was similarly ambiguous as to how much of the sentence the word “knowingly” should modify. *Id.* at 420. The statute in *Liparota* prohibited the unauthorized use of federal food stamps, and provided that “whoever knowingly uses, transfers, acquires, alters or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations is subject to a fine and imprisonment.” *Id.* at 420–21 (quotation marks omitted). The issue, then, was whether the Government must prove *only* knowing use, transfer, acquisition, alteration, or possession of the food stamps, or whether the Government must *also* prove that the defendant *knowingly* violated the statute or the regulations. *Id.*

The Court held that the Government must prove that the defendant not only knowingly used, transferred, acquired, altered, or possessed food stamps, but also that the defendant knowingly acted in violation of the food stamp statutes. *Id.* at 425. In support of its decision, the Supreme Court cited the “universal and persistent” presumption that “an injury can amount to a crime only when inflicted by intention[.]” *Id.* This presumption is especially true, the Court held, in cases where “to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct.” *Id.*

After *Liparota*, the federal courts of appeal rendered several decisions consistent with that opinion. For example, in 1998, the Second Circuit considered a similarly ambiguously worded statute with a knowingly mental state requirement. *See Figueroa v. United States*, 165 F.3d 111 (1998). In *Figueroa*, the criminal statute at issue was 8 U.S.C. § 1327, which provided that “[a]ny person who knowingly aids or assists any excludable alien . . . to enter the United States” shall be fined or imprisoned. *Id.* at 114. The issue on appeal was whether the Government was required to prove that the defendant had knowledge of *not only* his act of aiding and assisting entrance to the United States, *but also* of the excludability of the alien to whom he knowingly gave aid or assistance.

Writing for the majority, Judge Sotomayor held that “[a]bsent clear congressional intent to the contrary, statutes defining federal crimes are . . . normally read to contain a mens rea requirement that attaches to enough elements of the crime that together would be sufficient to constitute an act in violation of the law.” *Id.* at 116. The Second Circuit held, in accordance with *Liparota*, that because it is normally not a crime to aid or assist an alien in entering the United States *unless* that alien is for some reason “excludable,” the “knowingly” mental state must also modify the “excludability” element of the statute. *Id.*

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Therefore, in interpreting N.C. Gen. Stat. § 14-269.2(b), we adhere to the presumption that the “knowingly” *mens rea* requirement must attach to enough elements of the statute to make the commitment of that act illegal. In North Carolina, the act of “knowingly possessing or carrying . . . a gun” is not, on its own, a criminal act unless the gun is possessed or carried in violation of one of North Carolina’s other gun laws.⁶ In fact, the mere act of possessing or carrying a gun in accordance with the law is stringently protected by both the United States and North Carolina Constitutions. *See* U.S. Const. amend. II; N.C. Const. art I, § 30. Thus, the “knowingly” *mens rea* requirement in N.C. Gen. Stat. § 14-269.2(b) must attach to the “on educational property” element of the crime in order to sufficiently constitute an act in violation of the law.

There is, however, an exception to the general presumption favoring a *mens rea* requirement which we must address before we may conclude that the “knowingly” mental state should be read to modify the entire statutory sentence in this case. The United States Supreme Court has recognized that in certain cases, where the prohibited activity deals with “public welfare” or “regulatory” offenses, Congress may impose a form of strict criminal liability. Typically, these cases “involve statutes that regulate potentially harmful or injurious items.” *Staples*, 511 U.S. at 607. For the following reasons, we hold that the “public welfare” exception does not apply in this case.

In *United States v. Freed*, the United States Supreme Court upheld a criminal conviction without requiring the Government to prove that the defendant had a culpable mental state for one element of the offense. In *Freed*, the defendant was indicted for possession of unregistered grenades in violation of 26 U.S.C. § 5861(d), which makes it unlawful for any person “to receive or possess a [grenade] which is not registered to him.” *United States v. Freed*, 401 U.S. 601 (1971). The defendant argued that, in accordance with the presumption favoring a *mens rea* requirement for every criminal act, the Government must prove *not only* knowing receipt or possession of a grenade, *but also* knowledge that the grenade was unregistered. *Id.* at 607.

The Court agreed that the Government must prove knowledge of receipt or possession of the grenade, but the Court refused to read the *mens rea* requirement into the registration element. *Id.* at 612. The Court

6. *See, e.g.*, N.C. Gen. Stat. Ch. 14, Art. 52A (governing sale of weapons); N.C. Gen. Stat. Ch. 14, Art. 53 (governing purchase of weapons); N.C. Gen. Stat. Ch. 14, Art. 54B (governing concealed handgun permits).

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held that the Government need *only* prove that the defendant knew that the items in his possession were grenades—not that the defendant knew that the grenades were unregistered. *Id.* at 609. The Court identified the statute requiring grenade registration as “a regulatory measure in the interest of public safety.” *Id.* Thus, with regard to knowledge of registration, the Court reasoned that proof of a guilty mind was not required, because “one would hardly be surprised to learn that possession of a hand grenade is not an innocent act.” *Id.*

Later, though, in *Staples v. United States*, the United States Supreme Court explicitly refused to extend its holding in *Freed* to statutes criminalizing certain gun use. *Staples*, 511 U.S. 600. In *Staples*, the defendant was convicted under a federal statute that required certain “automatic” firearms to be registered under the National Firearms Act. *Id.* at 602. The evidence presented at trial showed the defendant knew he possessed a firearm, but did not know about the firearm’s automatic firing capabilities. *Id.* at 603–04. The Government asked the Court to rule in accordance with *Freed* that no proof of *mens rea* regarding the “automatic” qualities of the gun is required because the defendant should have known that possession of a gun is not an innocent act. The Court refused, holding that

the gap between *Freed* and this case is too wide to bridge. In glossing over the distinction between grenades and guns, the Government ignores the particular care we have taken to avoid construing a statute to dispense with *mens rea* where doing so would “criminalize a broad range of apparently innocent conduct.”

Id. at 610 (quoting *Liparota*, 471 U.S. at 426). The Court went on to explain that “there is a long tradition of widespread lawful gun ownership by private individuals in this country,” *id.*, and “[e]ven dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation.” *Id.* at 611. Thus, in *Staples*, the United States Supreme Court specifically removed gun possession from the category of “public welfare” or “regulatory” offenses that would allow for strict criminal liability.

Six months after *Staples*, the United States Supreme Court once again read a “knowingly” mental state requirement into a statute prohibiting dissemination of child pornography, even though the statute was ambiguous. See *United States v. X-Citement Video, Inc.*, 513 U.S. 64

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(1994). In *X-Citement Video*, the defendant was convicted under a statute providing:

Any person who . . . knowingly receives, or distributes, any visual depiction . . . if the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and such visual depiction is of such conduct . . . shall be punished as provided in [this statute].

18 U.S.C. § 2252 (1988). The defendant argued that the Government must prove *not only* knowing receipt or distribution of the prohibited depiction, *but also* that the defendant knew that the depiction involved a minor. The Supreme Court agreed. *Id.* at 78. The Court first pointed out that the crime in *X-Citement Video* is not a public welfare offense because “[p]ersons do not harbor settled expectations that the contents of magazines and film are generally subject to stringent public regulation. In fact, First Amendment constraints presuppose the opposite view.” *Id.* at 71. Next, the Court cited *Liparota* and *Staples*, and held that the “knowingly” mental state must modify the “minor engaging in sexually explicit conduct” element because “the age of the performers is the crucial element separating legal innocence from wrongful conduct.” *Id.* at 73.

Immediately following the United States Supreme Court’s decisions in *Staples* and *X-Citement Video*, the Fourth Circuit Court of Appeals heard three cases on this issue. *See United States v. Cook*, 76 F.3d 596 (4th Cir. 1996); *United States v. Forbes*, 64 F.3d 928 (4th Cir. 1995); *United States v. Langley*, 62 F.3d 602 (4th Cir. 1995). Our decision today is in line with that trilogy of Fourth Circuit cases.

First, in *United States v. Langley*, the Fourth Circuit considered the mental state requirement for a federal statute prohibiting felons from possessing firearms which have been shipped or transported through interstate commerce. *See Langley*, 62 F.3d 602. The issue in *Langley* was whether a mental state requirement should be read into the statute, and if so, whether the mental state requirement should be read into *only* the possession element, or all three elements of the crime: (1) possession of a firearm; (2) status as a felon; and (3) movement of the firearm through interstate commerce. *Id.* at 604-05. The Fourth Circuit read a mental state requirement into the “possession” element, but refused to read a mental state requirement into the other two elements of the crime. *Id.* at 606. The Court reasoned in *Langley* that courts across the country have consistently and explicitly “rejected the notion that the Government is required to prove either knowledge of felony status or interstate nexus”

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in prosecutions under this statute. *Id.* at 606. The Court stated that “[i]f Congress intended such a revolutionary change in the law, a change that involves the perniciousness of felons possessing firearms, it would have made clear the intention to do so.” *Id.* With regard to the congressional intent of the statute, the Court noted that “it is highly unlikely that Congress intended to make it *easier* for felons to avoid prosecution.” *Id.*

Although the case at bar and *Langley* both involve firearm possession, this case is distinguishable from *Langley*. Here, there is no similar history of courts consistently providing for strict criminal liability under the statute. Additionally, the “perniciousness of felons possessing firearms” concern articulated by the Court is simply not present here.

Second, in *United States v. Forbes*, the Fourth Circuit analyzed a federal statute making it unlawful for “any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm . . . or receive any firearm . . .” *Forbes*, 64 F.3d at 931. The issue was whether the Government must prove the defendant’s knowledge of being “under indictment.” Although the statute in *Forbes* lacked a specific *mens rea* requirement, the Fourth Circuit held that “[t]he defendant must have knowledge of the fact or facts that convert this innocent act into a crime. Here, that fact is the existence of a pending indictment.” *Id.* at 932.

This case presents essentially the same issue as *Forbes*. In this case, the fact that “convert[s] th[e] innocent act into a crime” is Defendant’s presence on educational property. Thus, in accordance with *Forbes*, the State must be required to prove knowledge of such a fact at trial.

Finally, in *United States v. Cook*, the Fourth Circuit considered a federal statute that provided: “It shall be unlawful for any person at least eighteen years of age to knowingly and intentionally . . . receive a controlled substance from a person under 18 years of age, other than an immediate family member.” 21 U.S.C. § 861 (1996); *see also Cook*, 76 F.3d at 598. In *Cook*, the evidence showed that the defendant sold crack cocaine in partnership with another person who was under the age of eighteen; he was convicted under the statute. *See id.* at 598–99. The defendant alleged on appeal that he did not know that his criminal cohort was under eighteen years old. *See id.* He asked the Fourth Circuit to overturn his conviction because the trial court did not instruct the jury as to any mental state requirement for the “under eighteen years of age” element of the crime. The Fourth Circuit refused, distinguishing the case from *X-Citement Video* because the statute in *Cook* “applies to

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persons who should be well aware that their conduct is subject to public regulation, *i.e.*, those receiving illegal drugs.” *Id.* at 601. The Court also noted that “the statute does not impinge on constitutionally protected conduct.” *Id.*

This case is easily distinguishable from *Cook*. Here, N.C. Gen. Stat. § 14-269.2(b) does not implicate conduct that is subject to public regulation (lawful gun possession, as described in *Staples*), and the statute here *does* impinge on constitutionally protected conduct (lawful gun possession pursuant to the Second Amendment of the United States Constitution and Section 30 of the North Carolina Constitution).

Therefore, in accordance with United States Supreme Court and Fourth Circuit precedent, as well as the well-settled presumption favoring proof of *mens rea* for criminal liability, we cannot allow for a conviction under N.C. Gen. Stat. § 14-269.2(b) without proof that Defendant *both* knowingly entered educational property *and* knowingly possessed a firearm or prohibited weapon when she did so. As the age of the performers was the “crucial element separating legal innocence from wrongful conduct” in *X-Citement Video*, here, the actor’s presence on educational property is the crucial element, and thus the State must be required to prove a defendant’s guilty mind for that element of the offense. *See X-Citement Video*, 513 U.S. at 73.

Such a reading of the N.C. Gen. Stat. § 14-269.2(b) not only adheres to our age-old principles of criminal law, but it is also entirely workable within our criminal justice framework. With regard to the burden of proof that the Government must bear in these cases, the Supreme Court held in *Liparota* that

the Government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations. This holding does not put an unduly heavy burden on the Government in prosecuting violators of § 2024(b)(1). To prove that petitioner knew that his acquisition or possession of food stamps was unauthorized, for example, the Government need not show that he had knowledge of specific regulations governing food stamp acquisition or possession. Nor must the Government introduce any extraordinary evidence that would conclusively demonstrate petitioner’s state of mind. Rather, as in any other criminal prosecution requiring *mens rea*, the Government may prove by

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reference to facts and circumstances surrounding the case that petitioner knew that his conduct was unauthorized or illegal.

Liparota, 471 U.S. at 419.

Under our reading of N.C. Gen. Stat. § 14-269.2(b), the State is not saddled with an unduly heavy burden of proving a defendant's subjective knowledge of the boundaries of educational property. Rather, the State need only prove a defendant's knowledge of her presence on educational property "by reference to the facts and circumstances surrounding the case." If, for example, the evidence shows that a defendant entered a school building and interacted with children while knowingly possessing a gun, the State would have little difficulty proving to the jury that the defendant had knowledge of her presence on educational property. If, however, the evidence shows that a defendant drove into an empty parking lot that is open to the public while knowingly possessing a gun—as in this case—the jury will likely need more evidence of the circumstances in order to find that the defendant knowingly entered educational property.

Thus, when considering a conviction under N.C. Gen. Stat. § 14-269.2(b), a jury must consider whether the defendant was knowingly on educational property by analyzing the facts and circumstances surrounding the event. In this case, the trial court precluded exactly that type of analysis in its instructions to the jury.

2. Legislative Intent of N.C. Gen. Stat. § 14-269.2(b)

The second principle of statutory construction that we consider in analyzing the *mens rea* requirement of N.C. Gen. Stat. § 14-269.2(b) is the probable legislative intent of the statute. In North Carolina, the "cardinal principle of statutory interpretation is to ensure that the legislative intent is accomplished." *McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 288, 444 S.E.2d 487, 490 (1994). Generally, "[t]he intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001). As we discussed above, the plain language of the statute is ambiguous—it does not make clear which clauses the mental state "knowingly" should modify. Therefore, in interpreting the *mens rea* requirement of N.C. Gen. Stat. § 14-269.2(b), we look to the legislative history of the statute and "the circumstances surrounding

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its adoption which throw light upon the evil sought to be remedied.” *State ex rel. North Carolina Milk Comm’n v. Nat’l Food Stores, Inc.*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967). For the following reasons, we hold that both the legislative history of the statute and the plain purpose of its enactment require proof of *mens rea* for the “on educational property” element.

In 1993, the North Carolina legislature amended the existing gun laws to make bringing a gun onto educational property a Class I felony. The 1993 version of N.C. Gen. Stat. § 14-269.2(b) read as follows: “it shall be a Class I felony for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind . . . on educational property.” 1993 N.C. Sess. Laws 558, HB 1008. Notably, the 1993 version of the statute contained no mental state requirement. In 2003, though, after the United States Supreme Court’s rulings in *X-Citement Video*, *Staples*, and *Liparota*, and the Fourth Circuit’s rulings in *Forbes*, *Langley*, and *Cook*, the issue of whether a mental state requirement should be “read into” N.C. Gen. Stat. § 14-269.2(b) was litigated in this Court. *See State v. Haskins*, 160 N.C. App. 349, 585 S.E.2d 766 (2003).

In *Haskins*, the defendant, a licensed “bail runner,” was in pursuit of a fugitive facing felony drug charges. *Id.* at 351, 585 S.E.2d at 767. The defendant followed the fugitive onto an elementary school campus with a gun in his holster, entered the school building, and asked a faculty member if she had seen anyone. *See id.*, 585 S.E.2d at 768. School personnel called the police, and the defendant was arrested and eventually convicted under N.C. Gen. Stat. § 14-269.2(b). *See id.* Haskins argued that “although N.C. Gen. Stat. § 14-269.2(b) does not explicitly contain an element of criminal intent or *mens rea*, willfulness or unlawfulness should be read into the statute because . . . strict liability offenses are disfavored in our criminal justice system.” *Id.* This Court disagreed.

In *Haskins*, we refused to read any mental state requirement into N.C. Gen. Stat. § 14-269.2(b). In support of our holding, we cited the “public health, safety, and welfare” exception—despite the United States Supreme Court’s holding in *Staples* which arguably removed lawful gun possession from that exception.⁷ *See id.* at 352, 585 S.E.2d at 768. We reasoned that the statute was enacted “because of the increased necessity for safety in our schools,” and therefore, it falls under the subset of crimes for which “the U.S. Supreme Court has upheld the imposition of criminal penalties without the finding of criminal intent.” *Id.* The

7. *Staples* is not cited by the Court in *Haskins*.

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Supreme Court of North Carolina subsequently denied review,⁸ and our holding in *Haskins* remained undisturbed for eight years.

In 2011, though, the General Assembly passed a bill that greatly expanded many rights regarding individual use of firearms in our State.⁹ See 2011 N.C. Sess. Laws 268, HB 650. Among other things, the bill added the “knowingly” mental state requirement to N.C. Gen. Stat. § 14-269.2(b), as follows: “It shall be a Class I felony for any person *knowingly* to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extra-curricular activity sponsored by a school.” 2011 N.C. Sess. Laws 268, HB 650, at Section 4 (emphasis added).¹⁰ The 2011 version of the statute is the version under which Defendant in this case was convicted.

The General Assembly’s 2011 addition of the word “knowingly” in front of “possess or carry” reflects a clear intent to prevent convictions under N.C. Gen. Stat. § 14-269.2(b) where the actor *unknowingly possesses or carries* a gun, and brings that gun onto educational property. In that instance, because of the unknowing possession, the actor harbors no evil mind. She could not maliciously use the gun if she does not know that she possesses it. The same must be true, then, for an actor who unknowingly enters educational property. She may not be convicted under the 2011 statute if she knowingly possesses or carries a gun, but *unknowingly* brings that gun onto land which the statute happens to deem “educational property.”¹¹

8. Haskins petitioned the Supreme Court of North Carolina for discretionary review of his case under N.C. Gen. Stat. § 7A-31. He also moved to appeal his case under N.C. Gen. Stat. § 7A-30 on the grounds that it involved a substantial constitutional question. The State opposed the petition for discretionary review and moved to dismiss the appeal for lack of a substantial constitutional question. The Supreme Court of North Carolina denied Haskins’ petition for discretionary review and allowed the State’s motion to dismiss the appeal. See *State v. Haskins*, 357 N.C. 580, 580, 589 S.E.2d 356, 356 (2003).

9. Most significantly, the bill provided for the codification of the “Castle Doctrine,” guaranteeing the right of citizens to use deadly force in defense of one’s home, motor vehicle, or workplace, and abolishing the duty to retreat. See 2011 N.C. Sess. Laws 268, HB 650, at Section 1. The bill also expanded the rights of individuals with concealed handgun permits, allowing permit holders to carry guns at State parks and State-owned rest stops, see *id.* at Section 14, and allowing certain non-law enforcement State officials to carry concealed handguns without regard to many of the limitations to which other permit holders are subject. See *id.* at Section 22(b).

10. The bill was ratified on 17 June 2011 and became effective on 1 December 2011.

11. The statute provides that “educational property” is defined as “[a]ny school building or bus, school campus, grounds, recreational area, athletic field, or other property owned, used, or operated by any board of education or school board of trustees, or directors for the administration of any school.” N.C. Gen. Stat. § 14-269.2(a)(1) (2013).

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It is particularly instructive here that—in the same breath—the legislature expanded the right to use and possess guns in North Carolina and also added the “knowingly” mental state requirement to N.C. Gen. Stat. § 14-269.2(b). The spirit of the 2011 act was to enhance the Second Amendment rights of North Carolina citizens, not to hinder those rights by allowing for convictions under the statute without proof of an evil mind. Therefore, the legislative history of the statute reveals an intent that the word “knowingly” modify both the “possess or carry” element and the “on educational property” element of N.C. Gen. Stat. § 14-269.2(b). We hold that the 2011 version of N.C. Gen. Stat. § 14-269.2(b) outlaws the act of bringing a gun—which the actor knowingly possesses or carries—onto property which she knows is educational property, or to a curricular or extracurricular activity which she knows is sponsored by a school.

Furthermore, the spirit and purpose of N.C. Gen. Stat. § 14-269.2(b) instructs that we should read a mental state requirement into the “on educational property” element of the crime. After all, the plain reason that the General Assembly enacted N.C. Gen. Stat. § 14-269.2(b) was to prevent the *presence of guns on educational property*—not to prevent individuals from possessing or carrying guns. The actor’s presence on educational property is the very crux of the criminal act. The General Assembly could not have simultaneously intended to expand the rights of individuals to use and possess guns while also permitting strict liability for unknowing violators of one of our State’s gun laws.

Finally, we note that our holding in *Haskins* was at least abrogated by the General Assembly’s 2011 addition of the mental state requirement to N.C. Gen. Stat. § 14-269.2(b). To the extent that *Haskins* conflicts with this opinion, it is now overruled.

3. The Rule of Lenity

The third and final principle of statutory construction under which we analyze N.C. Gen. Stat. § 14-269.2(b) is the rule of lenity. The rule of lenity provides additional support for our conclusion that the “knowingly” mental state must modify the presence on educational property element.

The rule of lenity is a principle of statutory construction that only applies when an appellate court is charged with interpreting an ambiguous criminal statute. “[W]hen applicable, the rule of lenity requires that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity[.]’” *State v. Heavner*, __ N.C. App. __, __, 741 S.E.2d 897, 901–02 (2013) (quoting *Rewis v. United States*, 401 U.S. 808, 812

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(1971)); *see also State v. Abshire*, 363 N.C. 322, 332, 677 S.E.2d 444, 451 (2009) (“The rule of lenity requires that we strictly construe ambiguous criminal statutes.”). However, in order for the rule of lenity to apply, there must be more than one “plausible reading that comports with the legislative purpose in enacting [the statute].” *See Abshire*, 363 N.C. at 332, 677 S.E.2d at 451 (refusing to apply the rule of lenity after determining that there was only one plausible construction of the statute).

Here, the question is whether the “knowingly” mental state requirement in N.C. Gen. Stat. § 14-269.2(b) modifies both clauses of the sentence: “possess or carry” and “on educational property.” As discussed above, based on the word’s placement in the sentence, it is plausible that the legislature either: (1) intended for “knowingly” to modify only the clause immediately following it, which is “possess or carry,” or (2) intended for “knowingly” to modify both clauses following it in the sentence, “possess or carry” and “on educational property.” *See* N.C. Gen. Stat. § 14-269.2(b) (2011).

Because there are at least two plausible ways to interpret the mental state requirement of N.C. Gen. Stat. § 14-269.2(b), we hold that the rule of lenity applies. Accordingly, we must resolve this issue in favor of lenity for Defendant, and we hold that the State bears the burden of proving a defendant’s mental state not only for the “possess or carry” element of the statute, but also for the presence on educational property element.

4. Plain Error

Finally, we must determine whether, in this case, the trial court’s failure to instruct the jury on the mental state requirement for the “on educational property” element amounted to plain error. For the following reasons, we hold that it did.

In 2012, our Supreme Court clarified how plain error review applies to unpreserved error in criminal cases where the trial court omits an element of the crime in its jury instructions. *See State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). In *Lawrence*, the Supreme Court analyzed the evolution of both federal and State plain error review and developed a framework for future application of the plain error rule in North Carolina. *See id.* The dissenting opinion in this case concludes that the trial court’s instructions did not rise to the level of plain error under *Lawrence*. We disagree.

In *Lawrence*, the defendant was indicted for two counts each of attempted robbery with a dangerous weapon, attempted kidnapping, attempted breaking and entering, and conspiracy to commit robbery

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with a dangerous weapon. *See id.* at 510, 723 S.E.2d at 329. The defendant was tried and convicted of all charges. *See id.* On appeal, the defendant argued that the trial court erroneously omitted from the jury instructions the element of robbery with a dangerous weapon that “the weapon must have been used to endanger or threaten the life of the victim.” *Id.* at 510–11, 723 S.E.2d at 329. The State conceded the trial court’s instruction failed to set forth all of the elements of robbery with a dangerous weapon. *See id.* The Court of Appeals held the trial court’s erroneous omission of an element of the crime amounted to plain error. *See State v. Lawrence*, 210 N.C. App. 73, 92, 706 S.E.2d 822, 836 (2011). The Supreme Court reversed. *See Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335.

The Supreme Court set forth the following framework for plain error review:

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

Id. at 518, 723 S.E.2d at 334 (internal citations and quotation marks omitted). The Supreme Court held that although the trial court’s instruction to the jury was erroneous, *see id.*, it did not amount to plain error because the jury was presented with “overwhelming and uncontroverted” evidence of the defendant’s guilt on the element of the crime which the trial court omitted from its instruction. *See id.* at 519, 723 S.E.2d at 335. The Court noted that “[t]he record contains testimony by multiple witnesses describing the efforts of the group, which included defendant, to kidnap, threaten, and rob [the victim] Ms. Curtis.” *Id.* at 519, 723 S.E.2d at 334. The Court held that the defendant could not show the prejudicial effect necessary to establish fundamental error; thus, the error did not amount to plain error. *See id.* at 519, 723 S.E.2d at 335.

This case is similar to *Lawrence* in that the trial court erroneously failed to instruct the jury on an element of the crime—the *mens rea* requirement. Here, the trial court instructed the jury that “the State must prove two things beyond a reasonable doubt: First, that the defendant knowingly possessed a Ruger pistol. And second, that the defendant was on educational property at the time she possessed the pistol.” For the

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reasons stated above, these jury instructions improperly relieved the State of its burden to prove that Defendant was *knowingly* on educational property at the time she possessed the gun. However, this case differs from *Lawrence* in that the evidence of Defendant's knowledge of her presence on educational property was neither "overwhelming" nor "uncontroverted."

Here, the trial court's error in its jury instructions amounted to fundamental error because the jury was presented with sufficient evidence that Defendant lacked knowledge of her presence on educational property. The evidence presented at trial showed that Defendant knew that she was not allowed to bring her gun onto "campus," and does not bring the gun into her dorm room. Further, on the day in question, Defendant chose not to drive into the gated, residential area of campus with the gun in her glove compartment, even though her stated purpose for being in the parking lot was to do her laundry in her dorm room. Rather, Defendant chose to park her car in an area open to the public, requiring no special permit to enter. This evidence suggests that Defendant *knew* that the gated, residential area of campus was "educational property," but that the public parking lot—which was mostly empty at the time—was not.

According to the trial court's erroneous jury instructions, these facts would be irrelevant to the jury's analysis of Defendant's guilt because they pertain only to Defendant's knowledge of her presence on educational property. Proper consideration of such facts probably would have impacted the jury's finding of guilt in this case. This evidence establishes the prejudicial effect, and thus the fundamental error, that was lacking in *Lawrence*.

Lastly, "because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (quotation marks omitted). Here, the trial court's erroneous instructions to the jury seriously affected the fairness of Defendant's trial. Defendant admitted to the element of possession in her opening statement. Thus, the *only* element of the crime which the jury could consider in determining guilt or innocence was the "on educational property" element. It was crucial in this case that the trial court properly instruct the jury on the only element of the crime at issue. Nevertheless, based on the trial court's instructions, the jury was only permitted to consider whether the State proved that Defendant was, in fact, on educational property—not whether she *knew* she was on educational property.

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We therefore find that the trial court committed plain error by failing to require the jury to consider whether the State met its burden of proving that Defendant was knowingly on educational property when she possessed the Ruger pistol. Our reading of N.C. Gen. Stat. § 14-269.2(b) requires the State to prove that a defendant both knowingly possessed or carried a prohibited weapon *and* knowingly entered educational property with that weapon. This interpretation of the statute safeguards the rights of lawful gun owners in our State while also protecting vulnerable citizens present on educational property.

B. Ineffective Assistance of Counsel

[2] Defendant's second assignment of error on appeal is that her trial counsel was ineffective by failing to argue an allegedly fatal variance in the indictment. Defendant asserts that the indictment against her was flawed because it stated that she possessed weapons at "High Point University, located at 833 Montlieu Avenue" but the evidence presented at trial showed that she possessed the weapons two miles away from that address, at "1911 North Centennial Street." We are not persuaded.

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985). Furthermore, "[t]he fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* at 563, 324 S.E.2d at 248. Finally, a reviewing court "should avoid the temptation to second-guess the actions of trial counsel[;] . . . judicial review of counsel's performance must be highly deferential." *State v. Gainey*, 355 N.C. 73, 113, 558 S.E.2d 463, 488 (2002).

An indictment must contain

[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2013). Our Supreme Court has held that "it is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice

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to defend against it and prepare for trial[.]” *State v. Sturdivant*, 302 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). Furthermore, we have consistently held that, as long as the indictment contains all of the essential elements of the crime, mere surplusage in the indictment language does not render a variance in the indictment fatal. *See State v. Pickens*, 346 N.C. 628, 645, 488 S.E.2d 162, 172 (1997) (upholding the indictment language as surplusage where the indictment alleged that the defendant discharged a “shotgun” and the evidence at trial showed he discharged a “handgun”); *State v. Bollinger*, 192 N.C. App. 241, 243, 665 S.E.2d 136, 138 (2008) (upholding the indictment language as surplusage where the indictment alleged that the defendant unlawfully carried “metallic knuckles” and the evidence at trial showed he carried a knife).

Here, the indictment stated:

The jurors for the State upon their oath present that on or about the date of offense and in the county named above the defendant named above unlawfully, willfully and feloniously did knowingly possess a pistol, Ruger 380 semi-automatic pistol, on educational property, High Point University located at 833 Montlieu Avenue, High Point, North Carolina.

The indictment charged all of the essential elements of the crime: that Defendant knowingly possessed a Ruger pistol on educational property—High Point University. We agree with the State that the physical address for High Point University listed in the indictment is surplusage because the indictment already described the “educational property” element as “High Point University.” Because the indictment properly contained all of the essential elements of the crime, Defendant has failed to establish any fatal variance in her indictment. Therefore, her assertion that her attorney’s representation fell below an objective standard of reasonableness for failure to argue this purported fatal variance must fail.

V. Conclusion

For the foregoing reasons, we find that the trial court committed plain error while instructing the jury in this case. As such, we reverse Defendant’s conviction, and remand for a new trial consistent with this opinion.

REVERSED and REMANDED.

Judge STROUD concurs.

BRYANT, Judge, concurring in part and dissenting in part.

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I concur in the portion of the majority opinion overruling defendant's challenge based on her claim of ineffective assistance of counsel. However, as to the main portion of the majority opinion, because I do not believe the trial court's instruction to the jury amounted to the level of plain error, I respectfully dissent.

The majority reverses the verdict of the jury and the judgment of the trial court, and remands the matter for a new trial on the premise that the trial court committed plain error in failing to instruct the jury on an element in a statutory offense that is not clearly set forth in the statute and was not presented to the trial court for its consideration. "This case presents the question of how the . . . plain error standard of review should be applied to error that is not preserved for appellate review." *State v. Lawrence*, 365 N.C. 506, 511, 723 S.E.2d 326, 330 (2012).

Under our adversarial system, parties are to present their evidence and arguments at trial, and "have an obligation to raise objections to errors at the trial level. Any other approach would place an undue if not impossible burden on the trial judge. . . . If parties do not timely object, they waive the right to raise the alleged error on appeal." *Id.* at 512, 723 S.E.2d at 330 (citations and quotations omitted). In a criminal case, error that is not preserved at trial, is reviewed on appeal only for plain error. *Id.* (citing N.C. R. App. P. 10(a)(4) (2012)).

"[Our North Carolina Supreme Court] and the United States Supreme Court have emphasized that plain error review should be used sparingly, only in exceptional circumstances, to reverse criminal convictions on the basis of unpreserved error[.]" *Id.* at 517, 723 S.E.2d at 333 (citing *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378 (1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203, 212 (1977), and *United States v. Ostendorff*, 371 F.2d 729 (4th Cir.) (1967))). "[T]he North Carolina plain error standard of review applies only when the alleged error is unpreserved, and it requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error." *Id.* at 516, 723 S.E.2d at 333 (citation omitted).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

Id. at 518, 723 S.E.2d at 334 (citation omitted).

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The question here regards whether the trial court committed plain error when instructing the jury on the felony charge of possessing a weapon on campus or other educational property in violation of N.C.G.S. § 14-269.2(b). The burden is on defendant to show that the instructional error had a probable impact on the jury verdict.

Pursuant to General Statutes, section 14-269.2(b), “[i]t shall be a Class I felony for any person *knowingly* to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school.” N.C.G.S. § 14-269.2(b) (emphasis added).

The majority opinion carefully considers whether “knowingly” modifies only “possess or carry” or whether it extends to the phrase “on educational property.” Using principles of statutory construction addressing the common law presumption against criminal liability without a showing of *mens rea*, the General Assembly’s intent in enacting and amending section 14-269.2(b), and the rule of lenity, as well as case law precedent from the United States Supreme Court and the Fourth Circuit Court of Appeals, the majority holds that “the ‘knowingly’ mental state in N.C. Gen. Stat. § 14-269.2(b) must modify both clauses – ‘possess or carry’ and ‘on educational property.’ ” I do not necessarily take issue with the analysis of the statute. However, even accepting that a conviction pursuant to this statute requires that a defendant is knowingly on educational property and knowingly in possession of a firearm, the critical inquiry here is whether in failing to instruct the jury they had to find defendant was knowingly on educational property to find defendant guilty of possessing a weapon on campus or other educational property in violation of N.C.G.S. § 14-269.2(b) the trial court’s error amounted to plain error. I submit that it does not.

We are required to apply the plain error rule cautiously. The prejudicial prong of plain error review requires that, even upon a showing of error, defendant can prevail only if she can establish that “after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation and quotations omitted); *see also State v. Smith*, 152 N.C. App 29, 37-38, 566 S.E.2d 793, 799 (2002). Such is not the case on this record. The trial court’s failure to instruct the jury that in order to find defendant guilty it must find defendant was knowingly on educational property was not an error that had a probable impact on the jury verdict.

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The majority opinion states that defendant “adamantly denied that she was on educational property.” The record reflects that outside of the jury’s presence, prior to and during a *Harbison* inquiry, defendant confirmed to the trial court that she knowingly and willingly allowed her counsel to make an admission before the jury that she was in possession of a firearm and three knives. And, in a statement before the court made outside the presence of the jury, and in opening statements made before the jury, defendant denied she was on educational property at the time she possessed the weapons. Other than during the *Harbison* inquiry and assertion during opening statements, and likely closing arguments, there is no indication in the record that defendant put forth any direct evidence before the jury that she was not on educational property. I do not consider this an adamant denial. It is clear however, that given defendant’s general admission to possession of the weapons, her only defense at trial was that she was not on educational property.

In its case-in-chief, the State presented four witnesses: a security officer with High Point University; a security supervisor of officers in the Security Department at High Point University; and two law enforcement officers with the High Point Police Department. The security officer testified he encountered defendant in the parking lot of the Administration Building—High Point University property. At the time, there were two entrances to the parking lot; one required passing an automatic security arm and the other was an open entrance that did not require passing through security. The security officer testified that “the whole building [was] surrounded by security” and that fences stood on both sides of the open entrance to the parking lot.

Q. Now just from your recollection – you’re pretty familiar with the campus for this section where you encountered [defendant] . . .

. . .

Were there any signs stating that this is campus property, no public allowed, anything of that nature?

A. There are signs posted that [it] is High Point University property.

A supervisor of High Point University security officers also testified that there was a “signature fence” around the Administration Building, and he believed there was signage indicating High Point University at or near the entrance to the Administration Building parking lot defendant used.

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Q. *Okay. But at the -- on December 25, 2012, was there the High Point University fence around that area?*

A. *Yes.*

(Emphasis added). Additionally,

Q. *All right. Was [defendant's] car located on campus?*

A. *Yes. It was in our parking lot of the Administration Building.*

(Emphasis added)

In response, defendant put forth no direct evidence that she was not on High Point University property. Furthermore, defendant presented no evidence that when she parked in the Administration Building parking lot to access her nearby on-campus apartment, *she did not know* she was on High Point University property.

The record evidence clearly shows that defendant was on High Point University Property when she entered the Administration Building parking lot encompassed by fencing with signage indicating the property belonging to High Point University, and that she was on notice she was on educational property. This evidence tends to show that not only was notice posted, but that defendant *knew* she was on High Point University property. Specifically, defendant was a senior at High Point University. On Christmas night she was going to her on-campus apartment to do laundry. So, she drove her car to the Administration Building parking lot, driving through one of two entrances surrounded by a fence and marked as High Point University property.

Evidence of defendant's knowledge that she was on High Point University property is further supported by defendant's statement to law enforcement. In defendant's statement to High Point Police Department officers, she stated that she had taken a concealed weapons class and knew she wasn't supposed to have a gun on campus. She said she didn't have anywhere else to keep the handgun, so she kept it locked in the glove compartment of her car. "I know I'm not supposed to have it on campus, but I don't take it in my room, or anything."

Defendant's written statement to law enforcement officers was admitted into evidence without objection. However, at some point later, after recognizing that the statement was prejudicial, and not at all helpful to her defense, defendant sought to make a late objection and rescind her earlier lack of objection to the admission of her statement.

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[240 N.C. App. 544 (2015)]

The trial court noted that the objection was untimely and that it was a late objection. The court also noted that defendant's statement was a confession, and that no motion to suppress had been filed. Defendant's objection to her statement was overruled by the trial court as being late and therefore waived.

Our plain error standard of review requires that defendant bear the heavy burden of establishing plain error. *Lawrence*, 365 at 518, 723 S.E.2d at 334. In order to meet her burden on plain error review, defendant had to show there was sufficient evidence before the jury to enable them to find that she did not know she was on educational property. No such evidence was presented in this trial. On the contrary, there was substantial and sufficient evidence for a jury to find not just that defendant was on educational property but that defendant *knew* she was on educational property. Therefore, defendant has failed to establish that but for the trial court's alleged error in its jury instructions, the jury probably would not have found her guilty of felony possession of a weapon on campus or other educational property, in violation of N.C.G.S. § 14-269.2(b). Thus, defendant has failed to establish fundamental error and, therefore, plain error. *See id.*

Because defendant cannot establish plain error, defendant is not entitled to a new trial. Accordingly, I would overrule defendant's argument, acknowledge the verdict of the jury, and affirm the judgment of the trial court.

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[240 N.C. App. 573 (2015)]

STATE OF NORTH CAROLINA

v.

CLAY DEWAYNE LEAKS, JR.

No. COA14-1141

Filed 21 April 2015

1. Indictment and Information—sex offender’s failure to register change of address—indictment sufficient

The indictment charging defendant with violating N.C.G.S. § 14-208.11(a)(2) was sufficient to confer subject matter jurisdiction upon the trial court. While defendant argued that the language of the indictment did not provide that he failed to notify the sheriff’s office in writing, defendant’s indictment sufficiently alleged that defendant was a person required to register as a sex offender; that he changed his address; and that he failed to notify the appropriate agency within three business days after moving.

2. Sentencing—sex offender’s failure to register change of address—variance between written judgment and announcement in defendant’s presence

The trial court violated defendant’s right to be present during sentencing by entering a written judgment imposing a longer prison term than that which the trial court had announced in defendant’s presence during the sentencing hearing. There was no indication in the record that defendant was present at the time the written judgment was entered.

Appeal by defendant from judgments entered 10 June 2014 by Judge John O. Craig in Forsyth County Superior Court. Heard in the Court of Appeals 4 March 2015.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Richard Croutharmel for defendant.

ELMORE, Judge.

On 11 February 2013, Clay Leaks, Jr. (defendant) was indicted by a Forsyth County Grand Jury pursuant to N.C. Gen. Stat. § 14-208.11(a)(2) for failing to report a change of address as a registered sex offender

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from 21 November 2012 through 30 January 2013 (case number 13 CRS 50995). Defendant was subsequently indicted for an additional charge of failing to report a change of address as a registered sex offender from 22 April through 20 May 2013 (case number 13 CRS 54822), and attaining the status of habitual felon (case number 13 CRS 121). The matter in case number 13 CRS 50995 was called for trial on 9 June 2014 in the Criminal Session of Forsyth County Superior Court. The jury found defendant guilty of the charge.

The additional charge of failing to report a change of address as a registered sex offender from 22 April through 20 May 2013 (case number 13 CRS 54822) was not before the jury at defendant's trial. However, defendant entered a plea bargain on this charge prior to sentencing in case number 13 CRS 50995. In exchange for his plea to the additional charge and stipulation to his status as a habitual felon, the State agreed to consolidate defendant's convictions. The trial court determined that defendant was a prior record Level V offender for felony sentencing purposes. The trial court entered a consolidated judgment, imposing a minimum term of 114 months to a maximum 149 months imprisonment. Defendant entered notice of appeal in open court.

I. Background

At defendant's trial for failing to comply with the sex offender registration program, the State presented evidence that tended to show the following: On 4 June 2001, defendant was convicted of a sex offense that required him to register as a sex offender pursuant to the sex offender registration requirements. Defendant is required to verify his address every six months and report any change of address within three business days. On 17 March 2012, defendant executed a one-year lease agreement for a residence located at 669 Old Hollow Road in Winston-Salem. Defendant timely notified the Forsyth County Sheriff's Office of his change of address.

The rental residence was a single-family home with a detached shed and a detached garage in the rear of the house. After occupying the residence for one to two months, defendant ceased making the monthly rental payment to his landlord, Homer Shockley (Shockley). In November 2012, Shockley and a Forsyth County Sheriff's Deputy went to the residence to serve defendant with eviction papers. The residence was empty and the electricity and water had been turned off. Padlocks were placed on the garage and storage building. Shockley testified that he drove by the residence approximately three times per week throughout

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November and December 2012, but he neither saw defendant on the property nor did he notice any activity at the residence.

During the week of 27 November 2012, the Forsyth County Sheriff's Office sent defendant an address verification letter to 669 Old Hollow Road. The letter was returned to the Sheriff's Office as "undeliverable." Ronald Lewis, a Forsyth County Sheriff's Deputy who worked in the sex offender unit, went to 669 Old Hollow Road in search of defendant. Deputy Lewis noticed that the house was vacant. Deputy Lewis did not look for defendant in the garage or shed.

On 31 January 2013, defendant went to the Forsyth County Sheriff's Office to report that his address had changed from 669 Old Hollow Road. Deputy Chris Davenport arrested defendant and charged him with failing to report a change of address as a registered sex offender.

Defendant testified on his own behalf at trial. Defendant explained that on 13 November 2012, he removed his personal belongings from the residence and stored them in a warehouse because he knew that he would be evicted from the residence. Defendant claimed that he subsequently moved into the storage shed on the property and resided there until 31 January 2013. The shed had minimal furnishings and electricity, but no water. Defendant testified that he would enter and exit the shed by using a ladder to climb through an air conditioning vent. Defendant alleged that he would rise early to work as a self-employed handyman. If he had no work, he would shower and eat at his wife's house while she was gone. Defendant testified that he would wait until nightfall before returning to the shed, hoping to go unnoticed. Given this, defendant argued that he had not, in fact, failed to report a change in his address because he had continued to reside on the property until 31 January 2013.

Despite defendant's testimony, the jury found defendant guilty of the charge. Defendant appeals.

II. Analysis**A. Sufficiency of Indictment**

[1] Defendant contends that the indictment charging him with violating N.C. Gen. Stat. § 14-208.11(a)(2) was insufficient to confer subject matter jurisdiction upon the trial court, as it failed to allege all of the essential elements of the offense. Specifically, defendant argues that the indictment failed to allege that he was required to provide "written notice" of

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a change of address, a prerequisite for the offense as described in N.C. Gen. Stat. § 14-208.9. As such, defendant insists that this error rendered his indictment fatally defective and requires that we vacate his conviction. We disagree.

On appeal, we review the sufficiency of an indictment *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009). In order to be valid and thus confer jurisdiction upon the trial court, “[a]n indictment charging a statutory offense must allege all of the essential elements of the offense.” *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996). The indictment “is sufficient if it charges the offense in a plain, intelligible and explicit manner.” *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972). “[I]ndictments need only allege the ultimate facts constituting each element of the criminal offense,” *State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995), and “[a]n indictment couched in the language of the statute is generally sufficient to charge the statutory offense[.]” *State v. Singleton*, 85 N.C. App. 123, 126, 354 S.E.2d 259, 262 (1987). “[W]hile an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form.” *State v. Harris*, 219 N.C. App. 590, 592, 724 S.E.2d 633, 636 (2012) (quotation and citation omitted).

N.C. Gen. Stat. § 14-208.11(a)(2) provides that a person who willfully “[f]ails to notify the last registering sheriff of a change of address” is guilty of a class F felony. In addition, N.C. Gen. Stat. § 14-208.9(a) provides: “If a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered.”

While the language of defendant’s indictment largely tracks the operative language of N.C. Gen. Stat. § 14-208.9(a), it does not provide that defendant failed to notify the sheriff’s office in writing. Defendant’s indictment provides that defendant:

unlawfully, willfully and feloniously did as a person required by Article 27A of Chapter 14 of the North Carolina General Statutes to register as a sex offender, knowingly and with the intent to violate the provision of that article fail to register as a sex offender by failing to notify the Forsyth County Sheriff’s Office of his change of address with in [sic] three business days after moving from his last registered address.

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Defendant argues that the indictment is fatally flawed because it omits the requirement that he provides “written notice” of a change of address. In advancing his argument, defendant solely relies on a recent unpublished opinion from this Court, *State v. Osborne*, ___ N.C. App. ___, ___, 763 S.E.2d 16, ___, 2014 N.C. App. LEXIS 700, 2014 WL 2993855 (July 1, 2014) (unpublished). We note that unpublished decisions are not controlling precedent. *State v. Beltran-Ponce*, 203 N.C. App. 373, 692 S.E.2d 487 (2010). Nonetheless, in *Osborne*, this Court acknowledged that the three essential elements of the offense described in N.C. Gen. Stat. § 14-208.9(a) had previously been determined: (1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant fails to notify the last registering sheriff of the change of address within three business days of the change. *Osborne*, ___ N.C. App. at ___, 763 S.E.2d at ___, 2014 N.C. App. LEXIS 700, at *2, 2014 WL 2993855, at *6 (quoting *State v. Barnett*, ___ N.C. App. ___, ___, 733 S.E.2d 95, 98 (2012)). However, in reviewing the defendant’s indictment *sua sponte*, the *Osborne* Court held that the indictment was fatally defective because it failed to allege that (1) defendant did not provide “written notice” of his move, and (2) did not specify the time requirements as within “three business days” of the defendant’s move to a new address. In effect, the *Osborne* Court imposed two additional essential elements of the offense set forth in N.C. Gen. Stat. § 14-208.9(a)—the “written notice” requirement and the “three business days” requirement. *Osborne*, ___ N.C. App. at ___, 763 S.E.2d at ___, 2014 N.C. App. LEXIS 700, at *7–9, 2014 WL 2993855, at *3. Given the holding in *Osborne*, defendant contends that his indictment was fatally defective because it too did not include the “written notice” requirement. We are not persuaded.

In *State v. Abshire*, our Supreme Court analyzed the 2005 version of N.C. Gen. Stat. § 14-208.11(a)(2) and N.C. Gen. Stat. § 14-208.9(a) and expressly limited N.C. Gen. Stat. § 14-208.9(a) to the three essential elements set forth above. *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009). Although N.C. Gen. Stat. § 14-208.9(a) has been amended since *Abshire* was published, the requirement that a sex offender report his or her change of address *in writing* has remained part of the statute since its enactment in 1995. See Act of July 29, 1995, ch. 545, sec. 1, 1995 N.C. Sess. Laws 2046, 2048. Notably, our Supreme Court declined to include the manner of the notice—“in writing”—in the essential elements of the offense. See *Abshire*, 363 N.C. at 328, 677 S.E.2d at 449. Because “[t]his Court is bound to follow the precedent of our Supreme Court,” *State v. Scott*, 180 N.C. App. 462, 465, 637 S.E.2d

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292, 294 (2006), we are unable to agree with defendant that his indictment is fatally defective merely because it fails to provide that notice must be made “in writing.” Instead, we consider the manner of notice, in person or in writing, to be an evidentiary matter necessary to be proven at trial, but not required to be alleged in the indictment. *See* N.C. Gen. Stat. § 15A-924(a)(5) (evidentiary matters as to the means and manner in which a crime was committed need not be alleged in an indictment). Facts tending to show that defendant did not furnish the sheriff’s office with “written notice” merely illustrate that defendant failed to comply with the requirements of N.C. Gen. Stat. § 14-208.9(a).

In sum, defendant’s indictment in the instant case sufficiently alleged that defendant (1) was a person required to register as a sex offender; (2) changed his address; and (3) failed to notify the appropriate agency within three business days after moving. As such, the indictment was valid as a matter of law and sufficient to confer subject matter jurisdiction upon the trial court. We overrule defendant’s argument.

B. Sentencing Error

[2] In his second argument on appeal, defendant contends that the trial court violated defendant’s right to be present during sentencing by entering a written judgment imposing a longer prison term than that which the trial court announced in his presence during the sentencing hearing. We agree.

It is well-settled that a defendant has a right to be present at the time that his sentence is imposed. *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999).

The facts of the instant case show that the trial court, in the presence of defendant, sentenced defendant as a Level V offender to a minimum term of 114 months and a maximum term of 146 months imprisonment. Subsequently, the trial court entered written judgment reflecting a sentence of 114 to 149 months active prison time. The sentence actually imposed on defendant was the sentence contained in the written judgment. Given that there is no indication in the record that defendant was present at the time the written judgment was entered, the sentence must be vacated and this matter remanded for the entry of a new sentencing judgment. *See id.*

In so holding, this Court looks to *Crumbley*, wherein we held that the trial court erred in converting the defendant’s sentence in the written judgment to run consecutively when the defendant was not present given that it orally rendered judgment in the defendant’s presence to

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concurrent terms of imprisonment. *See State v. Hanner*, 188 N.C. App. 137, 141, 654 S.E.2d 820, 823 (2008) (vacating the defendant's sentencing judgments when the trial court sentenced the defendant outside of his presence to consecutive terms of imprisonment after it orally imposed concurrent sentences before the defendant in open court.).

Under the North Carolina structured sentencing chart, if the trial court intended to sentence defendant to 114 months minimum incarceration, it was required to impose the 149 month maximum term. However, if the trial court intended to impose a maximum term of 146 months, it was required to impose the corresponding minimum term of 111 months imprisonment. Regardless, there is no evidence that defendant was present when the trial court entered its written judgments. Because the written judgments reflect a different sentence than that which was imposed in defendant's presence during sentencing, we must vacate defendant's sentence and remand for the entry of a new sentencing judgment. *See Crumbly* and *Hanner*, *supra*.

III. Conclusion

Defendant's indictment was sufficient to confer subject matter jurisdiction on the trial court such that the trial court did not err in hearing defendant's case. However, the trial court erred in entering a written judgment that altered the sentence it initially imposed on defendant because defendant was not before the trial court and able to be heard when the new sentence was entered. Accordingly, we hold that defendant received a trial free from error. However, we must vacate defendant's sentence and remand for the entry of a new sentencing judgment.

No error, in part; reversed and remanded, in part; new sentencing hearing.

Judges GEER and INMAN concur.

STATE OF N.C. v. OAKES

[240 N.C. App. 580 (2015)]

THE STATE OF NORTH CAROLINA AND FORSYTH COUNTY BY AND THROUGH ITS CHILD
SUPPORT ENFORCEMENT UNIT, ON BEHALF OF CHERRI L. JORDAN, PLAINTIFF

v.

BRYANT OAKES, SR., DEFENDANT

No. COA14-990

Filed 21 April 2015

Appeal and Error—interlocutory appeals and orders—substantial rights doctrine—underlying show cause order dismissed—no appellate jurisdiction

An appeal was dismissed for lack of appellate jurisdiction where the underlying show cause order was dismissed and defendant no longer faced any threat of contempt or incarceration. The Court of Appeals cannot exercise appellate jurisdiction under the substantial rights doctrine if, at the time the Court hears the case, the parties concede that the challenged order does not affect a substantial right. When this occurs, the proper course for the appellant is to petition for a writ of certiorari.

Appeal by defendant from order entered 5 March 2014 by Judge Denise Hartsfield in Forsyth County District Court. Heard in the Court of Appeals 21 January 2015.

Forsyth County Attorney Office, by Assistant County Attorney Twanda M. Staley, for plaintiff-appellee.

Mary McCullers Reece for defendant-appellant.

DIETZ, Judge.

Defendant Bryant Oakes appeals from the trial court's denial of his motion to dismiss an order to show cause. Oakes contends that the trial court entered the show cause order, which stems from unpaid child support, without first receiving an appropriate motion from Forsyth County. Oakes concedes that his appeal is interlocutory because there is more to be done in the trial court. But he contends that the trial court's order, which could expose him to civil contempt and possible incarceration, affects a substantial right and thus is immediately appealable.

Importantly, Oakes concedes on appeal (and Forsyth County agrees) that circumstances have changed, the show cause order was dismissed, and Oakes no longer faces any threat of contempt or incarceration. This

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Court cannot exercise appellate jurisdiction under the substantial rights doctrine if, at the time the Court hears the case, the parties concede that the challenged order no longer affects a substantial right. Accordingly, we dismiss this appeal for lack of appellate jurisdiction.

Facts and Procedural History

On 25 September 2002, the Forsyth County Child Support Enforcement Unit filed a civil summons and complaint against Defendant Bryant Oakes to establish paternity and child support for two minor children. Oakes admitted paternity of the minor children, and on 14 November 2002, the trial court entered an order directing Oakes to pay \$410 a month in child support and \$25 a month in arrearages.

On 29 August 2011, the County filed a motion for order to show cause alleging that Oakes failed to make a child support payment since 25 May 2010. That same day, the trial court issued an order to appear and show cause. The Forsyth County Sheriff's Office was unable to serve Oakes with notice of the hearing, and on 22 December 2011, the trial court dismissed the show cause order.

The trial court entered another order to show cause on 7 November 2012, ordering Oakes to appear in court and show why he should not be found in civil contempt. Oakes failed to appear at the hearing held 16 January 2013, and the court issued an order for arrest. The court set Oakes's purge payment—the amount he must pay to avoid being sent to jail for contempt—at \$20,000.

Oakes was arrested on 6 February 2013 and sent to jail. On 12 February 2013, the trial court found that he was in arrears of his child support payments by \$59,531.98. The court also found that Oakes was unable to pay his existing \$20,000 purge payment and reduced the amount to \$700. Oakes remained in jail.

On 13 March 2013, Oakes again went before the trial court. The court found that he was unable to purge his child support arrearage by paying \$700 and reduced the amount to \$500. Oakes was unable to pay at that time and returned to jail. On 3 April 2013, the court again reduced the purge amount from \$500 to \$100. Shortly after, Oakes paid \$100 and was released from jail.

On 31 July 2013, the court again reduced Oakes's purge payment from \$100 to \$50 and Oakes paid the \$50 at the hearing. The trial court ordered Oakes "to purge \$50.00 today and the temporary amount of \$100.00 on August 13, 2013 September 13, 2013 and October 13, 2013 to

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be applied to the arrears in this matter.” The Court also ordered Oakes to appear at a hearing on 30 October 2013.

At the 30 October 2013 hearing, Oakes, through counsel, moved to dismiss the 7 November 2012 order to show cause on the grounds that no supporting motion for the order was found in the court file. After a hearing, the trial court denied Oakes’s motion to dismiss and found that he “failed to make the ordered purge payments of \$100.00 on August 13, 2013, September 13, 2013 and October 13, 2013.” The court made the following conclusions of law:

4. The court takes judicial notice of the process used by the county attorney office and department of social services and that procedurally each order to show cause presented to a Judge for signature has a motion with it.
5. As long as an arrearage exists, the show cause will continue until dismissed by the county attorney or judge.

The court then ordered Oakes “to purge \$40.00 today and \$60.00 on November 1, 2013, \$100 on November 8, 2013, November 15, 2013 and November 22, 2013.” The court did not enter its order until 5 March 2014, and Oakes timely appealed on 18 March 2014. On 5 August 2014, after Oakes filed his notice of appeal but before the appeal was docketed in this Court, the trial court entered an order granting the county attorney’s request to dismiss the show cause order because Oakes was in substantial compliance.

Analysis

Ordinarily, this Court hears appeals only after entry of a final judgment that leaves nothing further to be done in the trial court. *See Steele v. Moore-Flesher Hauling Co.*, 260 N.C. 486, 491, 133 S.E.2d 197, 201 (1963). Oakes concedes that the trial court’s 5 March 2014 order is not a final order and that there is more to be done in the trial court. However, Oakes argues that his appeal is permissible under the substantial rights doctrine. *See* N.C. Gen. Stat. § 7A-27(b)(3)(a) (2013). Specifically, Oakes argues that the denial of his motion to dismiss the order to show cause affects a substantial right because failure to comply with the show cause order could expose Oakes to the possibility of civil contempt and incarceration. This Court previously has held that the threat of imprisonment or similar deprivations of liberty as a result of a contempt finding affects a substantial right and is immediately appealable. *See Hamilton v. Johnson*, ___ N.C. App. ___, ___, 747 S.E.2d 158, 162 (2013); *Guerrier v. Guerrier*, 155 N.C. App. 154, 157-58, 574 S.E.2d 69, 71 (2002).

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The flaw in this argument is that Oakes no longer faces the threat of incarceration or other deprivation of liberty. After Oakes filed his appeal, but before the record was docketed in this Court, Forsyth County asked the court to dismiss the show cause order on the ground that Oakes was now in substantial compliance with his child support payment obligations. In response, the trial court dismissed the show cause order. Oakes concedes all of these facts in his reply brief.

This Court's analysis under the substantial rights test permits review of otherwise unappealable orders to prevent the injustice that would result from the inability to seek immediate appellate review. *See, e.g., Little v. Stogner*, 140 N.C. App. 380, 382-83, 536 S.E.2d 334, 336 (2000); *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000); *Blackwelder v. State Dep't of Human Res.*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780-81 (1983). This Court cannot exercise appellate jurisdiction under the substantial rights doctrine if, at the time the Court hears the case, the parties concede that the challenged order does not affect a substantial right. In the rare case where this occurs, the proper course for the appellant is to petition for a writ of certiorari. This Court can then determine whether the issue is sufficiently important to warrant review although no right of appeal from the interlocutory order exists. *See* N.C. R. App. P. 21 (2013).

Because the parties concede that the order appealed from here does not affect a substantial right, and there is no pending petition for a writ of certiorari, we dismiss this appeal.

Conclusion

The order from which Defendant Bryant Oakes appealed does not affect a substantial right. Accordingly, we dismiss the appeal.

DISMISSED.

Judges STEELMAN and INMAN concur.

TOWN OF MATTHEWS v. WRIGHT

[240 N.C. App. 584 (2015)]

TOWN OF MATTHEWS, A NORTH CAROLINA MUNICIPAL CORPORATION, PLAINTIFF

v.

LESTER E. WRIGHT AND WIFE, VIRGINIA J. WRIGHT, DEFENDANTS

No. COA14-943

Filed 21 April 2015

Eminent Domain—private road—no public benefit

The Court of Appeals affirmed the trial court's order dismissing the Town of Matthews' condemnation action on property owned by defendants, who met their burden of showing that the taking would not accomplish any public benefit. The Town already had an easement on the private road at issue, and defendants never blocked access to it. Further, the Town did not attempt to condemn any other property owners' portions of the private road. The Court's conclusion was bolstered by the Town's history of unsuccessful attempts to take the property and the evidence of the Town's questionable motives.

Appeal by Plaintiff from judgment entered on 11 March 2014 by Judge F. Donald Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals on 20 January 2015.

Benjamin R. Sullivan, Parker Poe Adams & Bernstein, for plaintiff-appellant.

Peter J. Juran, for defendant-appellees.

HUNTER, JR., Robert N., Judge.

The Town of Matthews appeals from a judgment dismissing its condemnation claim taking the road fronting Lester and Virginia Wright's home. The Town contends the trial court misapplied the "public use or benefit" test set forth in N.C. Gen. Stat. § 40A-3(b). We affirm the dismissal.

I. Factual & Procedural History

The Wrights own a home in a subdivision in Matthews. Their 1984 warranty deed contains a thirty-foot street easement known as "Home Place" which extends the full length of the North side and a part of the East side of their lot. One end of the street is a dead end. The Wrights'

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lot is near the dead end. At the other end of the street is an outlet which all landowners use to connect to Reveredy Lane. The Wrights and five other landowners have built homes along Home Place.

Who Owns Home Place?

- A. *Wright v. Town of Matthews* (“*Wright III*”), 177 N.C. App. 1, 627 S.E.2d 650 (2006).

In 2004, the Wrights challenged the Town’s Zoning Board of Adjustment’s (“Zoning Board”) determination that Home Place was a public street. The Zoning Board’s 2004 decision was based upon a 1985 resolution declaring Home Place to be a public street, and the fact that in 1991 the town paved the street. The Wrights appealed by petition for writ of certiorari the determination to the superior court, which affirmed the decision of the Board. The Wrights appealed to this Court.

On 4 April 2006, in *Wright I*, this Court held that “the findings made by the Board and the trial court do not support the conclusion that Home Place is a public street.” *Wright I*, 177 N.C. App. at 16, 627 S.E.2d at 661. A private street or right-of-way may only become a public street by one of three methods: “(1) in regular proceedings before a proper tribunal . . . ; (2) by prescription; or (3) through action by the owner, such as a dedication, gift, or sale.” *Id.* at 10, 627 S.E.2d at 658. This Court held that there was no evidence that Home Place was adjudicated a public street through a condemnation proceeding or before a proper tribunal. *Id.* at 10–11, 627 S.E.2d at 658. Additionally, there was no evidence that Home Place was ever the subject of a gift or sale by the property owners. *Id.* at 11, 627 S.E.2d at 658. Therefore, “Home Place could only have become a public street by way of dedication or prescription.” *Id.* Because the Town had not maintained Home Place for the requisite twenty-year time period to establish prescription, we held that the only way Home Place could have become a public street would be through prior dedication—either express or implied. *Id.* at 15, 627 S.E.2d at 661. We reversed the order of the trial court, and remanded for “further findings detailing whether or not Home Place became a public street by means of implied dedication.” *Id.* at 14, 627 S.E.2d at 661.

Based on the decision of this Court in *Wright I*, the trial court vacated its order, and remanded the case back to the Zoning Board. *Town of Matthews v. Wright*, 194 N.C. App. 552, 553, 669 S.E.2d 841, 842 (2008). At a subsequent hearing on 10 August 2006, the Zoning Board determined “the issue of Implied Dedication was no longer an issue.” *Id.*

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B. Town of Matthews v. Wright (“*Wright III*”), 194 N.C. App. 552, 669 S.E.2d 841 (2008).

On 9 October 2006, without notice to the Wrights, the Town Board of Commissioners (“the Board”) adopted a “Resolution Adding Streets To The Matthews Street System (*NUNC PRO TUNC*¹ [25 March 1985]).” *Id.* at 554, 669 S.E.2d at 842. This resolution purportedly transformed Home Place into a “public street” retroactively, effective as of 1985. *Id.*

On 19 April 2007, the Town filed a complaint alleging the Wrights had erected two signs and a fence on a public street. *Id.* at 553, 669 S.E.2d at 841. The complaint alleged the Town ordered the Wrights to remove the obstructions within twenty days and they failed to comply. *Id.* The Wrights counterclaimed alleging trespass and raised, *inter alia*, the defense of *res judicata*. *Id.* at 553, 669 S.E.2d at 841–42. The trial court granted summary judgment in favor of the Wrights, finding that “Home Place is a private road,” and dismissing the Town’s complaint. *Id.* at 842, 669 S.E.2d at 554. The Town appealed that decision of the trial court to this Court, arguing that the *nunc pro tunc* resolution by the Board precluded the trial court’s finding that Home Place is a private street. *Id.* at 555, 669 S.E.2d at 843.

In *Wright II*, this Court invalidated the Board’s *nunc pro tunc* resolution. *Id.* at 556, 669 S.E.2d at 843. However, we declined to agree with the trial court’s finding that “Home Place is a private road” without the requisite findings which we ordered in *Wright I*. *Id.* Therefore, in *Wright II*, we again reversed the trial court and remanded the matter for further findings to determine if Home Place was impliedly dedicated as a public street. *Id.* at 556, 669 S.E.2d at 844.

C. Town of Matthews v. Wright (“*Wright III*”), 214 N.C. App. 563, 714 S.E.2d 867, 2011 WL 3570212 (2011) (unpublished).

On remand, a hearing was held on 21 July 2010. *Wright III*, at *3. On 4 August 2010, the trial court issued an order with the following findings:

11. This Court finds that on March 25, 1985, at a duly constituted regular meeting of the Town of Matthews Board of Commissioners that a resolution adding streets to the Town of Matthews street system was passed by the Board and that this resolution included Home Place.

1. *Nunc pro tunc* is “[a] phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, *i.e.*, with the same effect as if regularly done.” Black’s Law Dictionary 1069 (6th ed. 1990).

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. . . .

14. At no time subsequent to 1985, did the Defendants bring an action for inverse condemnation or refuse services provided by the Town of Matthews with respect to the upkeep and maintenance of Home Place and, as a fact, Home Place is a public street and has been such since [a] regularly constituted proceeding before a proper tribunal in March 1985.

Id. at *4. The Wrights appealed that order. *Id.* at *1. For a third time, on 16 August 2011, this Court reversed the decision of the trial court and remanded for findings on implied dedication in accordance with *Wright I* and *Wright II*. *Id.* at *4. In *Wright III*, we agreed with the Wrights' assertion that "[the Town] has twice now ignored the directive of the Court[.]" *id.* at *3, and we noted that despite our holdings in *Wright I* and *Wright II*, "no findings of fact were made as to whether Home Place was impliedly dedicated as a public street." *Id.*

On remand, on 17 September 2012, the issue of implied dedication was heard by a bench trial before Judge Beverly T. Beal. On 30 November 2012, the trial court issued a judgment ("the Beal judgment"), deciding the Wrights' interest in Home Place was a private right of way and not a public street. The trial court made the following relevant conclusions of law:

9. The language used in the deeds of conveyance constituting the Defendants' chain of title, in all of the variations, did not except from the land described as conveyed the portion contained within Home Place; rather, it only excepted from the description a *right of way* for the street. The particular language used in each instance does not imply the owner's intent to offer a dedication of the street to any governmental entity at the time of the conveyances.

. . . .

11. There was no intent to dedicate Home Place as a public street, either real or apparent. There was no implied dedication of Home Place as a public street.

After finding that the Wrights' easement had never been dedicated to the Town, the trial court dismissed the Town's cause of action against the Wrights.

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The Beal judgment analyzed *only* the Wrights' easement in Home Place by examining their chain of title. The Beal judgment did not reference any of the Wrights' neighbors' chains of title. At oral argument, counsel for the parties stated that one landowner has granted the Town an easement to his portion of Home Place, but admitted that the legal status of the four other neighbors' easements has not been established.

D. Current Litigation

During the months following the issuance of the Beal judgment and leading up to the Town's filing of the present condemnation action, the Wrights constructed a fence on their property—bordering Home Place but not blocking its access. The evidence shows that the Wrights have never erected any structure that would prevent access to Home Place.

Nevertheless, the Wrights' neighbors expressed concerns to Town of Matthews Mayor Jim Taylor ("Mayor Taylor"), and to the Town Commissioners, that the Wrights *might eventually* block access to Home Place. In the spring of 2013, the Board held meetings to discuss the possibility of condemning the Wrights' portion of Home Place. The minutes of those meetings, as well as emails between the Wrights' neighbors, Mayor Taylor, and the Town Commissioners shed light on the decision-making process that led to the present condemnation action.

On 11 February 2013, the Board held a closed meeting during which the condemnation action was discussed. The meeting minutes reveal a desire by the Board to "permanently close the issue" of the Wrights' ownership of their easement in Home Place. The minutes also reveal that the Board members disagreed as to whether condemnation of the Wrights' property was appropriate. Commissioner Miller indicated that "it should be up to the neighbors to come to the Town with their concerns rather than having the Town step in before something actually happens."

Immediately following the 11 February 2013 closed Board meeting, Mayor Taylor emailed the Wrights' neighbors and others, encouraging them to "voice [their] concerns" about the Wrights to the Board. Mayor Taylor's email said "[t]his might help swing some members of council to see the need to act sooner rather than waiting for the Wrights to actually block the street or do something else that could limit access to emergency traffic if it was needed." Mayor Taylor indicated that he was "sending this from [his] personal email and not [his] town email in order to protect the privacy of [the] communication."

On 27 February 2013, Commissioner Moore stated in an email to one of the Wrights' neighbors that she is "a very good friend" of neighbor

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Paul Jamison,² and that she “fully support[s] moving forward with whatever action the Town must take to ensure . . . access, security, and safety – before anything happens.” On the same day, Commissioner Gulley sent an email to another one of the Wrights’ neighbors, indicating that she “personally believe[s] that we should ‘take’ the street now but not all council members agree. This has gone on much too long.”

During the next public Board meeting, on 11 March 2013, Marty Kelso, one of the Wrights’ neighbors, spoke during the public comment portion of the meeting, asking for “the Board’s assistance in ensuring that Home Place remains a public street owned by the Town of Matthews.” George Young also spoke at the meeting in support of the Wrights. He stated “the taxpayers should [not] be paying any more money for litigation to deal with Home Place. Any additional litigation should be between the parcels involved and the Town should stay out of it.”

Nevertheless, on 25 March 2013, the Board discussed the condemnation in closed session and decided to “move forward with [the] condemnation action and place it on the agenda for discussion in the public meeting on April 8, 2013.” During the 8 April 2013 public session, the Board, at the urging of Mayor Taylor,³ unanimously approved a resolution stating the Town’s intent to condemn the Wrights’ property.

On 17 May 2013, the Town filed a complaint pursuant to N.C. Gen. Stat. § 40A, giving notice of the Town’s intent to condemn a portion of the Wrights’ land through eminent domain. The complaint included a description of the land to be condemned:

Being a portion of the Lester and Virginia Wright property as recorded in said Deed Book 4850 . . . : BEGINNING at a point at or near the centerline of a roadway designated as Home Place. The aforesaid point of beginning being the northwesterly corner of the Lester E. Wright and Virginia J. Wright property as recorded in Book 4850 . . . containing 20,071 sq. ft. (0.461 acres) more or less.

The complaint also stated the purpose of the condemnation: “for the opening, widening, extending, or improving roads, streets, alleys, and

2. Mr. Jamison owns property near but not abutting Home Place.

3. The meeting minutes describe Mayor Taylor’s statement to the Board as follows: “Minutes or hours, even seconds, can be the difference between life and death and he doesn’t want anything like that to occur and have the Board look back and say it could have done something to prevent a tragedy.”

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sidewalks and more particularly described as Home Place.” The Town estimated that the just compensation value of the property to be condemned was \$1,500. The Town has not moved to condemn any portion of Home Place other than that portion which lies in front of the Wrights’ property.

In the Wrights’ response, they asserted numerous affirmative defenses including, *inter alia*, the defenses that the Town’s condemnation serves no public use or benefit, inadequate compensation, and unclean hands.

On 21 January 2014, Judge F. Donald Bridges reviewed the condemnation action pursuant to N.C. Gen. Stat. § 40A-47, which provides that

[t]he judge, upon motion and 10 days’ notice by either the condemnor or the owner, shall, either in or out of session, hear and determine any and all issues raised by the pleadings other than the issue of compensation, including, but not limited to, the condemnor’s authority to take, questions of necessary and proper parties, title to the land, interest taken, and area taken.

N.C. Gen. Stat. § 40A-47 (2014). Upon agreement between the parties, the trial court issued a judgment on this matter without further hearing, based on affidavits submitted by the parties. In its judgment, signed on 11 March 2014, the trial court made the following relevant finding of fact:

9. Given [the] factual context, I conclude that the action of the Plaintiff’s Board of Commissioners on April 8, 2013 is simply an attempt to accomplish, through other means, what was originally intended by its actions on March 25, 1985, February 5, 2004, and October 9, 2006, rather than constituting a taking of property for some recently realized new need for a public purpose or benefit.

The trial court made the following relevant conclusions of law:

4. When the proposed taking of property is “for the opening, widening, extending or improving roads, streets, alleys and sidewalks . . .” such purpose normally would be sufficient to state a public use or benefit. Nonetheless, a case involving taking of private property cannot be considered in a vacuum and without regard to its factual history.

5. [T]he Court is convinced that the eminent domain statute and the Constitutions of North Carolina and the United

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States require more than the Plaintiff simply reiterating its previous position, without any plans whatsoever for construction, improvements or alterations to the property being taken.

6. Based upon the evidence before the Court, the Court finds that Plaintiff's purported taking is an arbitrary and capricious exercise by the Plaintiff of its powers of eminent domain.

The trial court concluded "[t]he Plaintiff's claim to the [Wrights'] Property by Eminent Domain is null and void." The Town filed timely notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27 (2014), which provides for an appeal of right to the Court of Appeals from any final judgment of a superior court.

III. Standard of Review

Our Supreme Court has held *de novo* review is appropriate when reviewing decisions of the trial court on all issues other than damages in eminent domain cases. *See Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001). We review eminent domain issues *de novo* because of the well-settled principle that *de novo* review is required where constitutional rights are implicated. *See id.* Both the United States and North Carolina Constitutions provide that citizens shall not be deprived of their property without due process of law. *See* U.S. Const. amend XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"); N.C. Const. art. I, § 19 ("No person shall be . . . deprived of his . . . property, but by the law of the land."). Constitutional rights are necessarily implicated in eminent domain cases because they involve a taking of private property. Thus, we review the trial court's judgment in this case *de novo*. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

IV. Analysis

N.C. Gen. Stat. § 40A-3(b) gives municipalities the power of eminent domain. The statute allows municipalities to "acquire by purchase, gift, or condemnation any property" as long as the acquisition is "[f]or the

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public use or benefit,” and fulfills one of the statute’s enumerated purposes. N.C. Gen. Stat. § 40A-3(b) (2014). Section (1) of the statute allows public condemnors to condemn land for the purpose of “[o]pening, widening, extending, or improving roads, streets, alleys, and sidewalks.” N.C. Gen. Stat. § 40A-3(b)(1). For the following reasons, we hold that the Town’s condemnation action against the Wrights should be dismissed as serving no public use or benefit, in violation of N.C. Gen. Stat. § 40A-3.

“[T]he determination of whether the condemnor’s intended use of the land is for ‘the public use or benefit’ is a question of law for the courts.” *Carolina Tel. & Tel. Co. v. McLeod*, 321 N.C. 426, 429, 364 S.E.2d 399, 401 (1988). If a municipality’s condemnation action purports to serve one of the statutorily enumerated purposes for public condemnation, then the burden shifts to the property owner to refute the municipality’s showing of a “public use or benefit.” See *City of Burlington v. Isley Place Condominium Ass’n*, 105 N.C. App. 713, 714–15, 414 S.E.2d 385, 386 (1992); see also N.C. Gen. Stat. § 40A-3(b) (2014). Because the Town’s condemnation action purports to be for the purpose of “opening” Home Place in accordance with section (1) of the statute, the burden is on the Wrights to show that the condemnation serves no public use or benefit.

Our Supreme Court uses two tests to determine whether a condemnation is for the public use or benefit: “The first approach—the public *use* test—asks whether the public has a right to a definite use of the condemned property. The second approach—the public *benefit* test—asks whether some benefit accrues to the public as a result of the desired condemnation.” *Id.* at 430, 364 S.E.2d at 401 (internal citations omitted). North Carolina courts have held that a condemnation must satisfy both the “public use” and the “public benefit” test. See *id.* at 432, 364 S.E.2d at 402. Under the “public use” test, the dispositive determination is “whether the general public has a right to a definite use of the property sought to be condemned.” *Id.* at 430, 364 S.E.2d at 401. It is the “public’s *right* to use, not the public’s actual use” that is the key factor in making the “public use” determination. *Id.* Under the “public benefit” test, the dispositive determination is “whether some benefit accrues to the public as a result of the desired condemnation.” *Id.* However, “not just any benefit to the general public will suffice under this test. Rather, the taking must furnish the public with some necessity or convenience which cannot readily be furnished without the aid of some governmental power.” *Id.* at 432, 364 S.E.2d at 402 (citation and quotation marks omitted).

Here, the Wrights have met their burden of showing that no public use or benefit is achieved from this condemnation of their property. The

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Wrights have shown that the condemnation fails the “public benefit” test. We reject the Town’s consistent characterization that this condemnation will “open” Home Place for public benefits. The predicate to “opening” Home Place is that it must have previously been “closed” in some way. We see two ways in which Home Place could have been “closed”: (1) if the Wrights blocked access to Home Place by placing a barricade on their property, or (2) if the entire street was public except for the Wrights’ thirty-foot private portion of the street. The evidence presented here supports neither circumstance. Instead, the evidence shows that the Wrights have never blocked access to Home Place. Furthermore, although the Wrights’ portion of Home Place is private land, with a right of way to the public for ingress and egress, most of the other landowners’ portions of Home Place have never been dedicated to the Town. It defies reason that the Town would need to condemn only the Wrights’ portion of Home Place in order to “open” the street.

The Town asserts that the condemnation serves the following public benefits: (1) neighbors’ access to their land, (2) utility service provider access, (3) fire fighters’ access to water, and (4) general community interconnectedness. Condemnation of the Wrights’ portion of Home Place furthers none of these goals. Rather, condemnation of the Wrights’ portion of Home Place would only allow for those public benefits on *the Wrights’ portion* of Home Place, which is at a dead end and landlocked by other individuals’ portions of Home Place. Most of the other portions of Home Place have neither been dedicated to the Town as public land nor condemned by the Town. Thus, opening the Wrights’ thirty-foot portion of Home Place to the public through condemnation will have no effect on the present ability of fire fighters or utility providers to access Home Place as a whole. Similarly, community interconnectedness is not served by opening a small portion of a larger, dead-end street. Finally, regardless of the result in this condemnation case, the Wrights’ neighbors will retain the right to access their properties through the easement in the Wrights’ deed. Because the Wrights have shown that the condemnation fails the “public benefit” test, we do not address whether the condemnation satisfies the “public use” test.

The sequence of events leading up to the condemnation bolsters our conclusion that no public use or benefit is served by the condemnation. The evidence shows that the Town was motivated by considerations irrelevant to the public benefit.⁴ The evidence shows that Mayor Taylor

4. In *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, the United States Supreme Court listed four types of evidence that can show an improper motive

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and some of the Commissioners considered personal conflicts between the Town and the Wrights in making the decision to condemn—rather than considering the public use or benefit of the condemnation.

We need not reach the issue of whether the Town's decision to condemn was arbitrary or capricious because the Wrights have met their burden of showing that the Town's condemnation action does not serve the public use or benefit. Therefore, the Town's condemnation action should be dismissed.

V. Conclusion

For the reasons stated above, the judgment of the trial court dismissing the Town's condemnation action is affirmed.

AFFIRMED.

Judges BRYANT and STROUD concur.

was employed by a legislative or administrative decision: "(1) the historical background of the decision; (2) the specific sequence of events leading up to the challenged decision; (3) departures from the normal procedural sequence; and (4) the legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." 429 U.S. 555, 565 (1977).

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TERRI YOUNG, PLAINTIFF

v.

DANIEL BAILEY, IN HIS OFFICIAL CAPACITY AS SHERIFF OF MECKLENBURG COUNTY, AND OHIO
CASUALTY INSURANCE COMPANY, DEFENDANTS

No. COA14-966

Filed 21 April 2015

1. Employer and Employee—statutory prohibition on termination for political reasons—not applicable to employees of sheriff

The trial court did not err by entering summary judgment in favor of defendant Sheriff of Mecklenburg County and his insurer in plaintiff employee's action for wrongful termination of employment. The termination of plaintiff, a deputy sheriff, did not violate N.C.G.S. § 153A-99 because plaintiff, as an employee of the sheriff, was not an employee of the county.

2. Employer and Employee—deputy sheriff—policymaking position—termination for political reasons—freedom of speech

The trial court did not err by entering summary judgment in favor of defendant Sheriff of Mecklenburg County and his insurer on plaintiff employee's state constitutional claim based on wrongful termination of employment. Even assuming that the sheriff terminated plaintiff's employment for political reasons, the termination did not violate plaintiff's rights under the Constitution because, as a deputy sheriff, plaintiff occupied a policymaking position and therefore could be fired for political reasons.

Appeal by plaintiff from judgment entered 25 April 2014 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 February 2015.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harold L. Kennedy, III, and Harvey L. Kennedy, for plaintiff-appellant.

Womble, Carlyle, Sandridge and Rice, LLP, by Sean F. Perrin, for defendant-appellees.

STEELMAN, Judge.

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Plaintiff, a deputy sheriff, was not a county employee as defined in N.C. Gen. Stat. § 153A-99, and could be discharged based upon political conduct without violating her free speech rights under the North Carolina Constitution.

I. Factual and Procedural Background

Terri Young (plaintiff) was a deputy sheriff employed by former Mecklenburg County Sheriff Daniel Bailey (defendant, with Ohio Casualty Insurance Company, collectively, defendants). In June 2009 defendant sent a letter to approximately 1,350 of his employees, announcing his candidacy for reelection and stating that he would appreciate campaign contributions. Plaintiff did not contribute to defendant's reelection campaign or volunteer for his campaign. Defendant was reelected in November 2010. On 6 December 2010 plaintiff was terminated from her position.

On 23 May 2013 plaintiff filed a complaint, asserting claims against defendants for wrongful termination of employment in violation of the public policy under N.C. Gen. Stat. § 153A-99 and wrongful termination in violation of her rights under the Constitution of North Carolina, Article 1, § § 14 and 36. Plaintiff alleged that she was an "outstanding employee" between 1990 and 2007; that she was harassed by her superior during defendant's political campaign, and that she had been terminated "for refusing to make contributions to [defendant's] re-election campaign and for refusing to volunteer to work on his campaign." Defendants filed answers denying the material allegations of plaintiff's complaint and asserting the defense of sovereign immunity. On 3 March 2014 defendants filed a joint motion for summary judgment, asserting that there were no genuine issues of material fact regarding plaintiff's claim for wrongful discharge in violation of N.C. Gen. Stat. § 153A-99; that defendant was entitled to sovereign immunity on the wrongful discharge claim up to the amount of the surety bond; and that plaintiff's constitutional claim was barred by the existence of an adequate state law remedy. On 25 April 2014 the trial court granted summary judgment for defendants and dismissed plaintiff's complaint.

Plaintiff appeals.

II. Standard of Review

Under N.C. Gen. Stat. § 1A-1, Rule 56(a), summary judgment is properly entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is

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entitled to a judgment as a matter of law.” “ ‘In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) [(2013)], and must be viewed in a light most favorable to the non-moving party.’ ” *Patmore v. Town of Chapel Hill N.C.*, __ N.C. App. __, __, 757 S.E.2d 302, 304 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (internal citation omitted)), *disc. review denied*, __ N.C. __, 758 S.E.2d 874 (2014).

III. Termination in Violation of Public Policy

[1] In plaintiff’s first argument she contends that she was wrongfully terminated in violation of the public policy under N.C. Gen. Stat. § 153A-99. Plaintiff asserts that she was a “county employee” as defined in § 153A-99, and that her termination from employment was in violation of this statute. We disagree.

In this case, plaintiff argues that she was terminated in violation of the public policy set forth in N.C. Gen. Stat. § 153A-99, which states that:

(a) The purpose of this section is to ensure that county employees are not subjected to political or partisan coercion while performing their job duties, [and] to ensure that employees are not restricted from political activities while off duty[.] . . .

(b) Definitions. For the purposes of this section: (1) “County employee” or “employee” means any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds[.] . . .

“The express purpose of N.C. Gen. Stat. § 153A-99 is ‘to ensure that county employees are not subjected to political or partisan coercion while performing their job duties[.]’ . . . [I]f a county employee was fired due to his political affiliations and activities, ‘this would contravene . . . the prohibition against political coercion in county employment stated in N.C. Gen. Stat. § 153A-99,’ hence violating North Carolina public policy.” *Venable v. Vernon*, 162 N.C. App. 702, 705-06, 592 S.E.2d 256, 258 (2004) (quoting *Vereen v. Holden*, 121 N.C. App. 779, 784, 468 S.E.2d 471, 474 (1996) (internal citations omitted)).

Plaintiff argues that she was an employee of the “sheriff’s department,” which is supported by county funds, and thus is entitled to the protections of N.C. Gen. Stat. § 153A-99. In support of this contention,

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plaintiff relies primarily on a 1998 advisory opinion of the North Carolina Attorney General, which opined that the statute was “applicable to elected officials of counties,” and on a case cited in the advisory opinion, *Carter v. Good*, 951 F. Supp. 1235 (W.D.N.C. 1996), *reversed and remanded*, 145 F.3d 1323 (4th Cir. N.C. 1998) (unpublished). Plaintiff also asserts that a close analysis of the word “thereof” in the statute tends to show that she was a county employee. However, we recently addressed these same arguments in *McLaughlin v. Bailey*, __ N.C. App. __, __ S.E.2d __ (2015), a case that is identical to the instant case. In *McLaughlin*, the plaintiffs were a deputy and another employee of the Mecklenburg County Sheriff who were discharged by the sheriff, the same defendant as in the instant case. We held that:

The employees of a county sheriff, including deputies and others hired by the sheriff, are directly employed by the sheriff and not by the county or by a county department. Sheriff’s employees are not “county employees” as defined in N.C. Gen. Stat. § 153A-99 and are not entitled to the protections of that statute.

McLaughlin, __ N.C. App. at __, __ S.E.2d at __. In addition, the scope of N.C. Gen. Stat. § 153A-99 was recently addressed by this Court in *Sims-Campbell v. Welch*, __ N.C. App. __, __, __ S.E.2d __, __ (3 March 2015). In *Sims-Campbell*, the plaintiff, an assistant register of deeds, argued that her firing violated N.C. Gen. Stat. § 153A-99:

Sims-Campbell also argues that [her firing] . . . violated Section 153A-99 of the General Statutes[.] . . . This argument fails because an assistant register of deeds is not a county employee. . . . We again find guidance in our cases dealing with the office of sheriff. In a series of cases, this court has held that sheriff’s deputies . . . are not county employees, but rather employees of the sheriff. . . . In light of the statute’s plain language and our analogous case law concerning deputy sheriffs, we conclude that an assistant register of deeds . . . is not a “county employee” within the meaning of N.C. Gen. Stat. § 153A-99(b)(1).

Sims-Campbell, __ N.C. App. at __, __ S.E.2d at __ (emphasis added). *McLaughlin* is indistinguishable from the present case and controls the outcome. “Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” *In re Appeal of Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37

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(1989). As a deputy sheriff, plaintiff was not a county employee within the meaning of N.C. Gen. Stat. § 153A-99, and cannot assert a claim for wrongful termination in violation of that statute. This argument is without merit.

IV. Violation of State Constitutional Rights

[2] Plaintiff next argues that her termination violated her right to freedom of speech guaranteed by Art. 1, § 14 of the North Carolina Constitution. We disagree, and again conclude that plaintiff's arguments on this issue are foreclosed by our decision in *McLaughlin*.

"[T]he First Amendment generally bars the firing of public employees 'solely for the reason that they were not affiliated with a particular political party or candidate,' as such firings can impose restraints 'on freedoms of belief and association[.]' " *Bland v. Roberts*, 730 F.3d 368, 374 (4th Cir. 2013) (quoting *Knight v. Vernon*, 214 F.3d 544, 548 (4th Cir. 2000) (internal quotation marks omitted), and *Elrod v. Burns*, 427 U.S. 347, 355, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality opinion)). However, "the Supreme Court in *Elrod* created a narrow exception 'to give effect to the democratic process' by allowing patronage dismissals of those public employees occupying policymaking positions." *Id.* (quoting *Jenkins v. Medford*, 119 F.3d 1156, 1161 (4th Cir. 1997) (*en banc*)).

In *Jenkins* we analyzed the First Amendment claims of several North Carolina sheriff's deputies who alleged that the sheriff fired them for failing to support his election bid and for supporting other candidates. . . . [W]e considered the political role of a sheriff, the specific duties performed by sheriff's deputies, and the relationship between a sheriff and his deputies as it affects the execution of the sheriff's policies. . . . [We] concluded "that in North Carolina, the office of deputy sheriff is that of a policy-maker, and that deputy sheriffs are the alter ego of the sheriff generally[.]" . . . [and] determined "that such North Carolina deputy sheriffs may be lawfully terminated for political reasons under the *Elrod-Branti* exception to prohibited political terminations."

Bland, 730 F.3d at 376 (quoting *Jenkins*, 119 F.3d at 1164). "In [*Jenkins*] the majority explained that it was the deputies' role as sworn law enforcement officers that was dispositive[.]" *Bland* at 377. In *McLaughlin*, we noted that the "reasoning of *Jenkins* and *Bland* was adopted by this Court in *Carter v. Marion*, 183 N.C. App. 449, 645 S.E.2d 129 (2007), review denied, 362 N.C. 175, 658 S.E.2d 271 (2008), and explained:

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The plaintiffs in *Carter* were former deputy clerks of court who claimed that they had been terminated from their employment for political reasons, in violation of their rights to free speech under the North Carolina Constitution. On appeal, [the *Carter* opinion] . . . discussed the holding of *Jenkins* that “deputies actually sworn to engage in law enforcement activities on behalf of the sheriff” could be lawfully terminated for political reasons, and noted that *Jenkins* based its holding on the facts that:

“[D]eputy sheriffs (1) implement the sheriff’s policies; (2) are likely part of the sheriff’s core group of advisors; (3) exercise significant discretion; (4) foster public confidence in law enforcement; (5) are expected to provide the sheriff with truthful and accurate information; and (6) are general agents of the sheriff, and the sheriff is civilly liable for the acts of his deputy.”

McLaughlin, __ N.C. App. at __, __ S.E.2d at __. (quoting *Carter* at 454, 654 S.E.2d at 131 (citing *Jenkins* at 1162-63)). *Carter* thus held that “political affiliation is an appropriate requirement for deputy clerks of superior court.” *Id.* This issue was also discussed in *Sims-Campbell*:

[T]his Court and various federal appeals courts repeatedly have held that deputy sheriffs and deputy clerks of court may be fired for political reasons such as supporting their elected boss’s opponents during an election.

Sims-Campbell, __ N.C. App. at __, __ S.E.2d at __ (citing *Carter*, *Jenkins*, *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), and *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989)). In *McLaughlin* we held that *Carter* was “controlling on the issue of whether [plaintiff] could lawfully be fired based on political considerations” and that the plaintiff’s “termination did not violate his free speech rights under the North Carolina Constitution.” *McLaughlin* at __, __ S.E.2d at __.

We conclude, based upon the prior opinions in *McLaughlin*, *Sims-Campbell*, and *Carter*, that, even assuming *arguendo* that plaintiff was terminated based on her political views, this did not violate her right to free speech under the North Carolina Constitution. “Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). Because plaintiff’s substantive

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arguments lack merit, we have no need to reach the parties' arguments regarding defendants' defense of sovereign immunity.

V. Conclusion

The trial court did not err in granting defendants' motion for summary judgment.

AFFIRMED.

Chief Judge McGEE and Judge BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 APRIL 2015)

BELL v. LOCKLEAR No. 14-1256	Robeson (14CVD1042)	Dismissed
CHENETTE v. METOKOTE CORP. No. 14-1156	N.C. Industrial Commission (100731) (X50759)	Affirmed
COLLINS v. SEATON CORP. No. 14-642	N.C. Industrial Commission (X54689)	Affirmed
CRUMP v. CITY OF HICKORY No. 14-569	Catawba (12CVS3212)	Affirmed
FOWLER v. RIDDLE No. 14-945	Buncombe (14CVS336)	Affirmed
GLEN WILDE, LLC v. FLETCHER No. 14-1171	Watauga (13CVD538)	No Error
GRUB, INC. v. SAMMY'S SEAFOOD HOUSE & OYSTER BAR, LLC No. 14-861	Carteret (12CVS201)	Affirmed in part; vacated and remanded in part.
IN RE C.B. No. 14-1365	New Hanover (14JA76)	Affirmed
IN RE D.F. No. 14-1063	Madison (05JA45)	Affirmed
IN RE FORECLOSURE OF CLARK No. 14-1231	Buncombe (12SP489)	Affirmed
IN RE J.T.M. No. 14-1241	Burke (04JT121)	Affirmed
IN RE S.A.O. No. 14-1226	Cabarrus (13JT144-145)	Affirmed
KIELL v. KIELL No. 14-630	Catawba (04CVD2494)	Vacated and Affirmed in part; Remanded in part.
LLOYD v. BAILEY No. 14-935	Mecklenburg (13CVS14121)	Reversed and Remanded

N.C. STATE BAR v. BATCHELOR No. 14-1196	N.C. State Bar (13DHC25)	Affirmed
RASBERRY v. JACOBS No. 14-1077	Martin (13CVS341)	Affirmed
SIMMONS v. WILLIAM E. SMITH TRUCKING, INC. No. 14-1082	N.C. Industrial Commission (570867)	Affirmed
STARK L. GRP., PLLC v. NEWTON No. 14-991	Durham (13CVS1865)	Affirmed
STATE v. BARKLEY No. 14-319	Durham (12CRS51329)	No Error
STATE v. BARNES No. 14-632	Edgecombe (12CRS53413)	No Error
STATE v. CHARLES No. 14-1069	Cumberland (12CRS57537)	No Error
STATE v. EURE No. 14-396	Pitt (13CRS50496-98) (13CRS50500)	No Error
STATE v. HALL No. 14-947	Cherokee (10CRS50376) (10CRS50377) (10CRS50378)	No plain error
STATE v. HARRISON No. 14-859	Burke (13CRS50052)	No Error
STATE v. JONES No. 14-896	Onslow (13CRS50929-30)	No error in part; no prejudicial error in part.
STATE v. PATIN No. 14-926	Wayne (12CRS50514) (12CRS5176)	Affirmed in part, Vacated in part and Remanded in part.
STATE v. PHILLIPS No. 14-1056	Orange (11CRS51977)	No Error
STATE v. ROYAL No. 14-1348	Gaston (14CRS1864)	Affirmed

STATE v. SPEAKMAN No. 14-368	Forsyth (06CRS63107) (06CRS63144)	No Error
STATE v. WILLIAMS No. 14-1100	Sampson (13CRS50318) (14CRS147)	No Error
STATE OF N.C. v. TIMBERLAKE No. 14-1044	Forsyth (00CVD9749)	Dismissed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

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ACCORD AND SATISFACTION

Affirmative defense—promissory notes—statute of frauds—oral modification unenforceable—The trial court did not err by granting summary judgment in favor of plaintiff bank regarding deficiency judgments for promissory notes. Stephen's affidavit constituted some evidence that Stephen and plaintiff orally agreed to an accord and satisfaction that modified the 2002 and 2007 promissory notes. Because both promissory notes fell within the statute of frauds, the alleged subsequent oral modification also fell within the statute of frauds and was thus unenforceable. **Macon Bank, Inc. v. Gleaner, 46.**

APPEAL AND ERROR

Appealability—appellate rules—failure to timely comply—dismissal of appeal—Defendant's appeal from a trial court order dismissing their appeal was dismissed. Defendants failed to timely comply with the provisions of N.C. R. App. P. Rule 3 and plaintiff had taken no action that would constitute a waiver of any of the requirements of the North Carolina Rules of Appellate Procedure, including, without limitation, any action that could be construed as a waiver of the requirement of timely service of the notice of appeal. **High Point Bank & Tr. Co. v. Fowler, 349.**

Appealability—de facto party—no prejudice—A juvenile suffered no prejudice as a result of the Department of Social Services' (DSS) participation during the 10 October 2013 hearing because the issue of whether the court erred by recognizing DSS as a de facto party in its 23 May 2014 order was unnecessary to this determination and was not properly preserved for review. **In re M.B., 140.**

Appealability—mootness—voluntary admission of minor into treatment facility—capable of repetition—Although juvenile's appeal from a 22 October 2013 order continuing his readmission to a psychiatric residential treatment facility for up to 30 days where the juvenile was subsequently discharged before its expiration would normally be dismissed as moot, it was not moot because orders of voluntary admission of a minor to a 24-hour facility are "capable of repetition, yet evading review" given their short duration. The State has a great interest in preventing unwarranted admission of juveniles into these treatment facilities. **In re M.B., 140.**

Appealability—writ of certiorari—incorrect date on notice of appeal—A juvenile's petition for a writ of certiorari as to the 22 October 2013 order based on an incorrect date was unnecessary, and thus was dismissed because a notice of appeal is not defective if intent to appeal can be fairly inferred. **In re M.B., 140.**

Appealability—writ of certiorari—notice of appeal—proper party—extraordinary writs—jurisdiction—A juvenile's petition for certiorari review as to the district court's 23 May 2014 order recognizing the Department of Social Services as a proper party was denied. Instead of filing notice of appeal from this order and moving to consolidate it with the already-pending appeal of the 22 October 2013 order, the juvenile's appellate counsel elected to pursue relief by petitioning for extraordinary writs from this Court. Consequently, the juvenile failed to meet the requirements of N.C.R. App. P. 3 and the Court of Appeals lacked jurisdiction to review the 23 May 2014 order. **In re M.B., 140.**

Argument abandoned—dismissed—The Court of Appeals dismissed defendant's argument based on N.C.G.S. § 15A-269(f) that the trial court erred by failing to order preparation of an inventory of biological evidence. Because defendant abandoned his argument that the trial court erred by denying his motion for appropriate relief requesting post-conviction DNA testing, he abandoned any argument under section 15A-269(f). **State v. Doisey, 441.**

APPEAL AND ERROR—Continued

Child support order—no certificate of service—The Court of Appeals had jurisdiction to consider the father's appeal in an action for child support and equitable distribution. No certificate of service for the child support order was filed, and therefore father's time for appeal was tolled. **Harnett Cnty. ex rel. De la Rosa v. De la Rosa**, 15.

Constitutional issue—raised for first time on appeal—Defendant failed to preserve the issue of whether the trial court violated his constitutional right to be free from double jeopardy when it sentenced him for both assault with a deadly weapon with the intent to kill and inflicting serious injury and assault inflicting serious bodily injury. Defendant did not raise the issue at trial, and a defendant may not raise a constitutional issue for the first time on appeal. **State v. Baldwin**, 413.

Failure to cite authority—The Court of Appeals declined to address the County's argument that the Property Tax Commission erred on remand by accepting the Taxpayer's argument that the County had already lost its case. The County cited no authority in support of its contention. **In re Appeal of Parkdale Mills**, 130.

Interlocutory appeals and orders—substantial rights doctrine—underlying show cause order dismissed—no appellate jurisdiction—An appeal was dismissed for lack of appellate jurisdiction where the underlying show cause order was dismissed and defendant no longer faced any threat of contempt or incarceration. The Court of Appeals cannot exercise appellate jurisdiction under the substantial rights doctrine if, at the time the Court hears the case, the parties concede that the challenged order does not affect a substantial right. When this occurs, the proper course for the appellant is to petition for a writ of certiorari. **State of N.C. v. Oakes**, 580.

Interlocutory orders and appeals—multiple defendants—overlapping facts—Plaintiff's appeal of the trial court's order granting summary judgment in favor of one defendant was interlocutory and therefore properly before the Court of Appeals. Because plaintiff's medical malpractice lawsuit against multiple defendants involved the same underlying facts, different proceedings could result in inconsistent verdicts. **Hawkins v. Emergency Med. Physicians of Craven Cty., PLLC**, 337.

Invited error—re-reading of jury instructions—failure to object—In his trial for murder and robbery charges, defendant did not invite error when he failed to object to the trial court re-reading the instructions to the jury. **State v. Grullon**, 55.

Issue raised for first time on appeal—The Court of Appeals declined to address whether defendant's general consent to a search of his person extended to the digital contents of a GPS device because the State did not make that argument before the trial court. **State v. Clyburn**, 428.

Motion to supplement record—denied—The Court of Appeals denied both motions to supplement the record in written orders filed 20 January 2015, reasoning that neither the 31 October 2013 order nor the subsequent abuse, neglect, and dependency orders were available to or relied upon by the district court when it concurred in a juvenile's readmission to a 24-hour psychiatric residential treatment facility after the 10 October 2013 hearing. **In re M.B.**, 140.

No ruling by trial court—dismissed—The Court of Appeals dismissed defendant's argument based on N.C.G.S. § 15A-268 that the trial court erred by failing to order preparation of an inventory of biological evidence. Because defendant did not make a written request pursuant to the statute, the trial court did not rule on such a request and it was not properly before the Court of Appeals. **State v. Doisey**, 441.

APPEAL AND ERROR—Continued

Preservation of issues—failure to argue—drugs—motion to dismiss—sampling technique—sufficiency of sample size—The trial court did not err in a drugs case by denying defendant's motion to dismiss based on the State's flawed evidence regarding an agent's alleged improper sampling technique. The agent was not cross-examined by defense counsel regarding the sufficiency of the sample size, nor was the sufficiency of the sample size a basis for defendant's motion to dismiss. Further, the State presented sufficient evidence to conclude that defendant possessed and transported 28 grams or more of a Schedule II controlled substance. **State v. James, 456.**

Preservation of issues—failure to argue at trial—The Court of Appeals declined to take judicial notice of both Version 4 and Version 7 of the SBI Laboratory testing protocols since they were never presented to the trial court. **State v. James, 456.**

Rule of Evidence 403 objection—different Rule 403 argument on appeal—Defendant preserved his Rule 403 objection to the admission of his recorded interview with police. While he made new arguments on appeal for why the evidence was inadmissible under Rule 403, his argument remained based on Rule 403. **State v. Baldwin, 413.**

Violation of multiple appellate rules—appeal dismissed—In an equitable distribution case, issues were dismissed for violation of the Appellate Rules where defendant did not argue that the trial court committed legal error and did not provide legal authority in support of his contentions. His arguments merely contained personal immunity, did not show prejudice, or raised a moot issue. **Comstock v. Comstock, 304.**

ATTORNEY FEES

Findings of fact—skill, rate, and experience—In an appeal from a judgment awarding plaintiff subcontractor damages and attorney fees, the Court of Appeals reversed and remanded the portion of the trial court's judgment awarding attorney fees. The trial court's order failed to include the necessary findings of fact regarding the skill required for the services rendered, the customary rate for such work in the area, and the experience or ability of plaintiff's attorney. **Brown's Builders Supply, Inc. v. Johnson, 8.**

Findings of fact—unjustifiable refusal to resolve out of court—In an appeal from a judgment awarding plaintiff subcontractor damages and attorney fees, the Court of Appeals rejected defendants' argument that the trial court abused its discretion by awarding attorney fees without first finding that defendants unjustifiably refused to resolve the matter out of court. The trial court's order contained such a finding. **Brown's Builders Supply, Inc. v. Johnson, 8.**

Statutory lien—scant record on appeal—The Court of Appeals held that the trial court did not abuse its discretion by awarding attorney fees under N.C.G.S. § 44A-35 to the prevailing party in a contract dispute, but the prevailing party was not entitled to attorney fees incurred on appeal. Neither party included transcripts or other evidence from the hearing on the underlying action or attorney fees. **R & L Constr. of Mt. Airy, LLC v. Diaz, 194.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Findings of fact—sufficiency of evidence—Although respondent mother challenged several of the district court's findings of fact as unsupported by the evidence

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

in a child abuse, dependency, and neglect case regarding the mother's substance abuse problem; the paternal grandparents' ability to provide care; and the Mecklenburg County Department of Social Services, Youth and Family Services' reasonable efforts; there was competent evidence to support the pertinent findings. **In re N.B., 353.**

Guardianship awarded to paternal grandparents—verification of adequate resources—cessation of reunification efforts—findings of fact—The trial court did not err in a child abuse, dependency, and neglect case by awarding guardianship to the paternal grandparents allegedly without properly verifying that they would have adequate resources to care appropriately for the juveniles as required by N.C.G.S. § 7B-906.1(j). The findings exhibited that the trial court considered this factor. Further, the trial court ceased reunification efforts after making the necessary findings under N.C.G.S. § 7B-906.1(d)(3). **In re N.B., 353.**

CHILD CUSTODY AND SUPPORT

Arrears—determination of amount—not based on evidence—The trial court's determination of the amount of child support arrears and a payment schedule were reversed where the findings of fact regarding arrears were not based upon any evidence and the appellate court could not determine how the arrears were calculated or from what date the trial court made a child support modification effective. **Harnett Cnty. ex rel. De la Rosa v. De la Rosa, 15.**

Imputed income—father's expenses—paid by his parents—The trial court abused its discretion in the manner in which it imputed income to the father in a child support action by relying solely upon the father's parents' expenditures for the father's living expenses to impute income. While in some cases monthly expenditures may be a reasonable way to assist the trial court in determining an imputed income amount, in this case, father was not paying those expenses. **Harnett Cnty. ex rel. De la Rosa v. De la Rosa, 15.**

Imputed income to father—increased debt—lack of effort to earn—The trial court did not abuse its discretion by finding that a father showed a deliberate disregard of his responsibility to support his children, given his increased debt and lack of effort recently to earn an income. The trial court's "deliberate disregard" finding of fact supported the trial court's determination to impute income. **Harnett Cnty. ex rel. De la Rosa v. De la Rosa, 15.**

Support order—treated as permanent—A 2011 order was a permanent order for child support because, although it was entered without prejudice, no review hearing was set and all of the parties and the trial court treated the order as permanent. Because it was a permanent child support order, the burden of proof to show a substantial change in circumstances would be on the father for his motion to modify the order and on the County on the motion to show arrears. **Harnett Cnty. ex rel. De la Rosa v. De la Rosa, 15.**

CHILD VISITATION

Minimum requirements—frequency—length of time—supervision—The trial court's visitation order met the minimum requirements for visitation. The trial court accounted for the minimum frequency and length of the visitation (one hour, once per month) and provided for the visitations to be supervised by the family therapist. The trial court left it to respondent mother to coordinate with the family therapist regarding these visits. **In re N.B., 353.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Recording of jailhouse call—The trial court did not abuse its discretion in a first-degree murder case by admitting into evidence the recording of the jailhouse telephone call defendant placed to his father. It was direct evidence showing defendant shot the victim and he knew it. It was particularly probative in light of defendant's defense that his actions were a result of his diagnosed intermittent explosive disorder and not premeditated and deliberate. The statements made immediately after defendant's arrest put into context defendant's responses in which he admitted shooting the victim. **State v. Mitchell, 246.**

CONSTITUTIONAL LAW

Double jeopardy—assault with a deadly weapon with the intent to kill and inflicting serious injury—assault inflicting serious bodily injury—Exercising its discretionary power under Rule 2 of the Rules of Appellate Procedure, the Court of Appeals held that the trial court violated defendant's right to be free from double jeopardy by sentencing him for both assault with a deadly weapon with the intent to kill and inflicting serious injury (AWDWIKISI) and assault inflicting serious bodily injury (AISBI). N.C.G.S. § 14-32.4(a) states that a person may be convicted of AISBI “[u]nless the conduct is covered under some other provision of law providing greater punishment.” Defendant's AISBI conviction was vacated, and the case was remanded for resentencing on his AWDWIKISI conviction. **State v. Baldwin, 413.**

Double jeopardy—attempted first-degree murder—assault with a deadly weapon with intent to kill and inflicting serious injury—The trial court did not err by denying defendant's motion to require the State to elect the offense upon which it would proceed at trial. Under *State v. Tirado*, 358 N.C. 551 (2004), convictions for attempted first-degree murder and assault with a deadly weapon with the intent to kill and inflicting serious injury—offenses that arose from the same conduct—did not subject the defendant to double jeopardy. **State v. Baldwin, 413.**

Effective assistance of counsel—failure to argue fatal variance in indictment—improper school address—surplusage—The trial court did not err in a possession of a weapon on educational property case by concluding that defendant did not receive ineffective assistance of counsel based on his failure to argue a fatal variance in the indictment regarding an improper school address. The indictment charged all of the essential elements of the crime and the physical address for High Point University listed in the indictment was surplusage. The indictment already described the educational property element as High Point University. **State v. Huckelba, 544.**

Effective assistance of counsel—failure to object—A defendant in an assault inflicting serious injury by strangulation, second degree kidnapping, and second degree sexual offense case did not receive ineffective assistance of counsel because his trial counsel's failure to object to the officer's testimony and failure to object to the striking of the defense witness's testimony did not prejudice him. **State v. Gillespie, 238.**

CONSTRUCTION CLAIMS

General contractor licensure—control over project and subcontractors—In an appeal from a judgment awarding plaintiff subcontractor damages and attorney fees, the Court of Appeals rejected defendants' argument that plaintiff's failure to hold a general contractor's license barred recovery. Plaintiff's work on defendants'

CONSTRUCTION CLAIMS—Continued

kitchen remodel project was limited to selling and installing some hardware. Because plaintiff did not exercise control over defendants' project or other subcontractors, plaintiff was not subject to the licensure requirement for general contractors. **Brown's Builders Supply, Inc. v. Johnson, 8.**

CONTEMPT

First motion—involuntary dismissal—second motion—new issues—The trial court erred by ruling that plaintiff's second motion for contempt was not properly before the court after a first that had been dismissed. The second motion raised issues not raised in the first. **Hebenstreit v. Hebenstreit, 27.**

CRIMINAL LAW

Clerical error—remanded for correction—A clerical error on the Additional File No.(s) and Offense(s) form attached to the judgment, which did not affect defendant's sentences for the charges of assault inflicting serious injury by strangulation; second degree kidnapping; and second degree sexual offense, was remanded for correction of the clerical error in the judgment. **State v. Gillespie, 238.**

DAMAGES AND REMEDIES

Interest—basis of calculation—The trial court did not err in its award of pre-judgment interest based on the full amount of compensatory damages awarded, \$1,500,000.00. Although defendant contended that prejudgment interest should be calculated based only on the portion of compensatory damages for which defendant is responsible, the trial court's calculation was in accordance with the formula espoused by the North Carolina Supreme Court in *Brown v. Flowe*, 349 N.C. 520. **Estate of Coppick v. Hobbs Marina Props., LLC, 324.**

DIVORCE

Equitable distribution—attorney fees—defendant's failure to provide adequate support—findings—not a child support action—The trial court did not err by awarding attorney's fees to plaintiff where defendant argued that plaintiff failed to offer any competent evidence to suggest that defendant refused to provide support that was adequate under the circumstances. Because the attorney's fees were not awarded as a result of a child support action, the trial court was not required to make a finding that defendant refused to provide adequate support under the circumstances. **Comstock v. Comstock, 304.**

Equitable distribution—brokerage account—marital property—The trial court did not err in an equitable distribution action by finding that a brokerage account was marital property. Defendant presented evidence tending to show that the brokerage account had some separate property attributes; however, competent evidence in the record supported the trial court's finding that the USAA Brokerage Account valued at \$85,670 was marital property. However, as defendant conceded in his brief, he was unable to trace the funds in this account back to the 2007 inherited funds because he "had forgotten to deposit the funds since the time [he] inherited the funds." **Comstock v. Comstock, 304.**

Equitable distribution—debt—women, gambling, alcohol—not for the joint benefit of the parties—The trial court did not err in an equitable distribution action

DIVORCE—Continued

by finding that a portion of the debt on two credit cards were defendant's separate debt. Although defendant challenged the trial court's methodology, he did not challenge the amount of the debt at separation. The trial court also found that the pro se defendant failed to meet his burden of showing that charges for "women," "alcohol," and "gambling" were for the joint benefit of the parties. **Comstock v. Comstock, 304.**

Equitable distribution—findings—evidentiary and ultimate—An equitable distribution order appropriately contained both "ultimate" and "evidentiary" findings necessary for appellate review of whether the property was equitably divided. The judgment was not fatally defective. **Comstock v. Comstock, 304.**

Equitable distribution—home equity line of credit—defendant's separate debt—The trial court did not err by finding that a home equity line of credit was defendant's separate debt. The trial court's finding on this issue was supported by competent evidence. **Comstock v. Comstock, 304.**

Equitable distribution—insurance policy—finding of stipulation—erroneous—The trial court erred in an equitable distribution action by finding that the parties stipulated that an insurance policy was marital property and by concluding that the policy value should be distributed to defendant. The parties did not stipulate that the policy was marital. **Comstock v. Comstock, 304.**

Equitable distribution—insurance proceeds after tornado—amounts paid for materials—In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, there was competent record evidence to support the trial court's findings regarding amounts paid by defendant for materials. **Robbins v. Robbins, 386.**

Equitable distribution—insurance proceeds after tornado—considerations on remand—In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, the trial court was instructed on remand to reconsider the entire distribution scheme, with a new date of distribution and, if requested by either party, consider additional evidence and arguments regarding changes in the condition or value of the marital home as well as distributional factors since the date of the last trial. However, the parties should not be permitted a "second bite at the apple" with new evidence or arguments as to the classification or valuation of marital or divisible property or debts up to the final day of the equitable distribution trial. **Robbins v. Robbins, 386.**

Equitable distribution—insurance proceeds after tornado—defendant's accounting—truthfulness—In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, the trial court's findings concerning defendant's truthfulness in her accounting for the proceeds both were and were not supported by the evidence. Her testimony supported the first finding regarding a payment to a particular individual, but there was no competent evidence in the record that defendant paid money from the insurance proceeds to four individuals who were not listed in her accounting to the court. **Robbins v. Robbins, 386.**

Equitable distribution—insurance proceeds after tornado—failure to provide accounting—In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, an unequal distribution in favor of plaintiff was reversed where the trial court put substantial weight on the defendant's failure to provide an accounting for the insurance proceeds

DIVORCE—Continued

and on the neglect of the marital residence. The findings were based on the erroneous classification of the insurance proceeds as marital property when they were actually defendant's separate property. On remand, the trial court was instructed to make findings of fact upon all of the distributional factors upon which evidence was presented and reconsider the distributional factors. **Robbins v. Robbins, 386.**

Equitable distribution—insurance proceeds after tornado—findings—partial replacement of roof—In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, the trial court's finding that defendant made the unilateral decision not to replace the entire roof of the structure, which was the primary purpose of the insurance proceeds, was supported by the testimony of defendant herself. **Robbins v. Robbins, 386.**

Equitable distribution—insurance proceeds after tornado—kind of repairs performed—separate property—In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, a finding of fact that the only structural repairs defendant made to the marital residence consisted of repairing certain floors and patching the roof was supported by competent record evidence. On remand, the trial court should consider these repairs as defendant's use of her separate property to make repairs to the marital home and not as a misappropriation of marital funds. **Robbins v. Robbins, 386.**

Equitable distribution—insurance proceeds after tornado—not marital properly—In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, the trial court erred by concluding that the proceeds were marital property that should be divided by the court. The parties' homeowner's insurance policy lapsed subsequent to their separation, and defendant took out a new homeowner's insurance policy on the marital residence in her sole name. Because the premiums on the policy were paid with defendant's assets, the proceeds from the homeowner's insurance policy were the separate property of defendant. **Robbins v. Robbins, 386.**

Equitable distribution—insurance proceeds after tornado—unequal distribution—In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, remanded on another issue, defendant argued that the trial court erred in making an unequal distribution in favor of plaintiff, but the insurance proceeds were defendant's separate property which was not subject to interim distribution or equitable distribution by the trial court. On remand the trial court must reconsider the distributional factors in light of the fact that the insurance proceeds were defendant's separate property. **Robbins v. Robbins, 386.**

Equitable distribution—insurance proceeds after tornado—value of marital home—In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, there was competent evidence in the record to support some portions of the trial court's finding regarding the marital property, although the trial court on remand may reconsider its conclusions based upon this finding in light of the fact that the insurance proceeds were defendant's separate property. One particularly salient portion of this finding was not supported by the evidence: there was no evidence regarding the current value of the marital home. The sole appraisal in evidence addressed *only* the date of separation value of the home, and based on both the appraisal and the plaintiff's own testimony, the home was in dilapidated condition even then. **Robbins v. Robbins, 386.**

DIVORCE—Continued

Equitable distribution—IRA—separate property—resource for distributive award—The trial court did not err by ordering that more than 50% of an IRA's value be awarded to plaintiff. The IRA was not a marital asset as the parties stipulated that it was defendant's separate property. However, defendant's IRA, a separate liquid asset, was available as a resource from which the trial court could order a distributive award. **Comstock v. Comstock, 304.**

Equitable distribution—orders concerning an IRA—interlocutory—Defendant's appellate arguments concerning certain orders in an equitable distribution action were dismissed where there was no indication from the record that all of the claims brought by the parties had been resolved, thus making the orders interlocutory. Defendant did not articulate any argument that the domestic relations order or the injunction order affected a substantial right. **Comstock v. Comstock, 304.**

Equitable distribution—post-separation debt payment—The trial court was not required to consider a post-separation debt payment as a distributional factor in its equitable distribution order where defendant failed to carry his burden and did not show that he could receive credit or reimbursement for his payment under these circumstances. Defendant made no argument that the HOA payments were made toward a divisible or marital debt. **Comstock v. Comstock, 304.**

Equitable distribution—post-separation debt payments—source of funds—The trial court did not err by failing to make adequate findings of fact and conclusions of law about post-separation debt payments made by defendant. Fatal to defendant's argument is that he claims he made post-separation payments from the USAA Investment Brokerage Account. Assuming that defendant in fact made the alleged post-separation payments, he failed to establish that the source of these payments was his separate funds. **Comstock v. Comstock, 304.**

Equitable distribution—post-separation payments—mortgage and HOA dues—The trial court did not err by not crediting defendant with post-separation debt payments where defendant argued that the payments were used to keep property out of foreclosure due to plaintiff's alleged limited or non-payment of HOA dues while she lived in the home. Plaintiff stated that she paid the monthly mortgage amount and the monthly HOA fees and that both were fully paid when she moved out of the house. **Comstock v. Comstock, 304.**

Equitable distribution—value of vehicle—de minimis error—The trial court's valuation of a vehicle in an equitable distribution action remained undisturbed where defendant correctly argued that the trial court's finding of value was not supported by competent evidence but nonetheless failed to establish prejudicial error. The erroneous vehicle value was 0.6% of the adjusted value of the marital estate, which constituted a de minimis error. **Comstock v. Comstock, 304.**

Equitable distribution—wedding ring—findings—supported by evidence—written finding prevails—Competent evidence in an equitable distribution action supported the trial court's finding that defendant kept the wedding ring after separation and had possession of the wedding ring at the time of trial. With regard to the conflict between the trial court's oral statement during trial and the trial court's order, the written finding of fact in the trial court's order controlled. **Comstock v. Comstock, 304.**

Equitable distribution—wedding ring—past orders—other competent evidence supporting finding—Although defendant argued in an equitable distribution

DIVORCE—Continued

appeal that the trial court erroneously overruled his objection to plaintiff's attorney's recitation of past orders to establish evidence of possession of the wedding ring, any such error was not prejudicial because it was already established that there was competent evidence supporting the trial court's finding that defendant had possession of the ring at the time of trial. **Comstock v. Comstock, 304.**

EMINENT DOMAIN

Private road—no public benefit—The Court of Appeals affirmed the trial court's order dismissing the Town of Matthews' condemnation action on property owned by defendants, who met their burden of showing that the taking would not accomplish any public benefit. The Town already had an easement on the private road at issue, and defendants never blocked access to it. Further, the Town did not attempt to condemn any other property owners' portions of the private road. The Court's conclusion was bolstered by the Town's history of unsuccessful attempts to take the property and the evidence of the Town's questionable motives. **Town of Matthews v. Wright, 584.**

EMPLOYER AND EMPLOYEE

Deputy sheriff—policymaking position—termination for political reasons—freedom of speech—The trial court did not err by entering summary judgment in favor of defendant Sheriff of Mecklenburg County and his insurer on plaintiff employee's state constitutional claim based on wrongful termination of employment. Even assuming that the sheriff terminated plaintiff's employment for political reasons, the termination did not violate plaintiff's rights under the Constitution because, as a deputy sheriff, plaintiff occupied a policymaking position and therefore could be fired for political reasons. **McLaughlin v. Bailey, 159.**

Deputy sheriff—policymaking position—termination for political reasons—freedom of speech—The trial court did not err by entering summary judgment in favor of defendant Sheriff of Mecklenburg County and his insurer on plaintiff employee's state constitutional claim based on wrongful termination of employment. Even assuming that the sheriff terminated plaintiff's employment for political reasons, the termination did not violate plaintiff's rights under the Constitution because, as a deputy sheriff, plaintiff occupied a policymaking position and therefore could be fired for political reasons. **Young v. Bailey, 595.**

Detention officer—objective reasonableness of termination—no specific evidence of improper motivation—The trial court did not err by entering summary judgment in favor of defendant Sheriff of Mecklenburg County and his insurer on plaintiff employee's state constitutional claim based on wrongful termination of employment. The Court of Appeals did not need to determine whether plaintiff's termination was for political reasons because plaintiff failed to offer any evidence that he would not have been fired for violations of the rules and policies of the sheriff's department in carrying out his job duties. **McLaughlin v. Bailey, 159.**

Statutory prohibition on termination for political reasons—not applicable to employees of sheriff—The trial court did not err by entering summary judgment in favor of defendant Sheriff of Mecklenburg County and his insurer in plaintiff employees' action for wrongful termination of employment. Plaintiffs' terminations did not violate N.C.G.S. § 153A-99 because plaintiffs, as employees of the sheriff, were not employees of the county. **McLaughlin v. Bailey, 159.**

EMPLOYER AND EMPLOYEE—Continued

Statutory prohibition on termination for political reasons—not applicable to employees of sheriff—The trial court did not err by entering summary judgment in favor of defendant Sheriff of Mecklenburg County and his insurer in plaintiff employee's action for wrongful termination of employment. The termination of plaintiff, a deputy sheriff, did not violate N.C.G.S. § 153A-99 because plaintiff, as an employee of the sheriff, was not an employee of the county. **Young v. Bailey, 595.**

EQUITY

Subrogation—erroneous quitclaim deed—The trial court did not err by granting plaintiff's motion for summary judgment to quiet title under the legal doctrine of equitable subrogation where June Withers was the sole owner of property; she and her daughter Rhonda sought a loan to refinance a prior deed of trust on the property, the new lender (PFS) required a quitclaim deed from June with June and Rhonda as joint tenants, and the closing attorney erroneously included June's other daughters on the deed. The doctrine of equitable subrogation applied because land is unique and the remedies at law identified by defendants were inadequate. **Bank of N.Y. Mellon v. Withers, 300.**

ESTOPPEL

Equitable estoppel—deficiency judgment—promissory notes—fraud—oral modification of real property interest—statute of frauds—The trial court did not err by granting summary judgment in favor of plaintiff bank regarding deficiency judgments for promissory notes. Stephen's affidavit did not raise the factual issue of whether plaintiff is equitably estopped from collecting deficiency judgments on the 2002 and 2007 promissory notes. Stephen's affidavit did not constitute evidence supporting the application of equitable estoppel. Because defendants proffered no evidence of fraud and the alleged oral modification involved a real property interest, defendants' defense of equitable estoppel could not override the statute of frauds. **Macon Bank, Inc. v. Gleaner, 46.**

EVIDENCE

Accident reconstruction—expert opinion—reliability—The trial court did not err in a negligence case by admitting an expert's accident reconstruction testimony under N.C.G.S. 8C-1, Rule 702 that in his expert opinion, decedent's husband was "the cause of this accident." Plaintiff failed to show that the expert's testimony was unreliable. Also, plaintiff did not further challenge the admissibility of the expert's testimony. **Pope v. Bridge Broom, Inc., 365.**

Current school expense funding—sufficiency of evidence—outside scope of proposed budget—Although defendant board of commissioners contended that the trial court erred in a case seeking additional school funding to plaintiff board of education by denying its motions for a directed verdict based on insufficient evidence, plaintiff presented evidence tending to show current expense funding was needed to meet state mandates and policies and capital outlay funding was needed to maintain and repair school facilities. However, having determined that much of plaintiff's evidence was outside the scope of plaintiff's proposed budget for the 2013-2014 fiscal year and should not have been admitted into evidence at trial, the case was remanded for a new trial. **Union Cnty. Bd. of Educ. v. Union Cnty. Bd. of Comm'rs, 274.**

EVIDENCE—Continued

Hearsay—opinion—minor sex assault victim's changed demeanor—no plain error or abuse of discretion—The trial court did not commit plain error in a first-degree rape and indecent liberties with a child case by allowing the victim's mother to provide certain hearsay testimony, nor did it abuse its discretion in allowing the mother to offer an opinion as to changes she observed in her daughter's behavior after the assault. The mother's response constituted a shorthand statement of fact and therefore did not qualify as improper lay opinion testimony under Rule 701. Further, it was improbable that the jury's finding of guilt would have differed if the trial court had excluded the testimony. **State v. Pace, 63.**

Rule of Evidence 403—recording of interview with police—The trial court did not err under Rule 403 by admitting a recording of defendant's interview with police after his arrest for shooting a man. The Court of Appeals rejected defendant's argument that the evidence had an undue tendency to suggest decision on an improper basis. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. **State v. Baldwin, 413.**

Witness testimony—defendant's incriminating statements prior to crime—relevancy—state of mind—premeditation—deliberation—The trial court did not abuse its discretion in a first-degree murder case by allowing witnesses to testify that defendant made statements before the shooting that he had come to town that day to shoot someone to get the keys to his grandmother's car. The statements illustrated defendant's state of mind near the time of the shooting, which was relevant to the charge of first-degree murder under the theory of premeditation and deliberation. **State v. Mitchell, 246.**

FALSE PRETENSE

Bad character evidence—post-arrest interview video—In defendant's trial for obtaining property by false pretenses, the trial court did not commit plain error by admitting a video recording of defendant's post-arrest interview with a police detective, which contained evidence of defendant's bad character. Defendant knew the contents of the video yet chose not to object—perhaps as part of his trial strategy—and he failed to meet his burden of showing that the trial court erred. Even assuming the trial court erred, in light of abundant other testimony that defendant actively sought to defraud elderly homeowners, defendant did not demonstrate prejudice. **State v. Barker, 224.**

Bad character testimony—showed plan to defraud—In defendant's trial for obtaining property by false pretenses, the trial court did not err by admitting Rule 404(b) testimony from multiple witnesses tending to show that defendant actively sought to defraud elderly homeowners by falsely telling them their roofs needed repairs. This evidence was relevant for showing defendant's common plan, knowledge, intent, and lack of mistake, and the probative value outweighed the prejudicial effect. Furthermore, the trial court gave a limiting instruction to the jury. **State v. Barker, 224.**

Indictment—misrepresentation—roof repairs—The Court of Appeals rejected defendant's argument that his indictments for obtaining property by false pretenses were facially invalid because they failed to "intelligibly articulate" defendant's misrepresentations. The indictments clearly stated that defendant told his elderly victims their roofs needed repairs when the roofs in fact did not need repairs. **State v. Barker, 224.**

FALSE PRETENSE—Continued

Jury instructions—specific misrepresentation and property—not required—In defendant's trial for obtaining property by false pretenses, the trial court did not err by failing to instruct the jury on the specific alleged misrepresentation made or the property received by defendant. The trial court properly gave the pattern jury instruction and was not required to specify the misrepresentation or property received. Even assuming error, there would be no plain error because the Court of Appeals has consistently found no error where a trial court has given the pattern jury instruction on obtaining property by false pretenses. **State v. Barker, 224.**

Sufficiency of the evidence—misrepresentation—roof repairs—incomplete or substandard work—In defendant's appeal of his convictions for obtaining property by false pretenses, the Court of Appeals rejected his argument that the trial court erred by denying his motion to dismiss. In the light most favorable to the State, the evidence showed that defendant falsely told his elderly victims that their roofs needed repairs and then took their money only to perform incomplete or substandard work. **State v. Barker, 224.**

HOMICIDE

Attempted—jury instructions—imperfect self-defense—murderous intent—The trial court did not commit plain error by instructing the jury on attempted first-degree murder but failing to instruct on imperfect self-defense and attempted voluntary manslaughter. In light of the abundant evidence of defendant's murderous intent, defendant failed to show that, absent the alleged error, the jury probably would have acquitted him of the attempted first-degree murder charge. **State v. Baldwin, 413.**

Attempted—jury instructions—premeditation and deliberation—wounds inflicted after victim felled—The trial court did not err by instructing the jury that it could consider wounds inflicted after the victim was felled to determine whether defendant acted with premeditation and deliberation. The instructions at issue explained that the jury "may" find premeditation and deliberation from certain circumstances "such as" wounds inflicted after the victim was felled. There was no indication that the trial court believed the evidence supported the circumstances listed. **State v. Baldwin, 413.**

First-degree murder—felony murder—discharging firearm into occupied property—motion to dismiss—sufficiency of evidence—The trial court did not err in a first-degree murder case by failing to dismiss the charge of first-degree murder based upon committing another felony during the murder due to insufficient evidence. The evidence supported the felony charge of discharging a firearm into occupied property. The State presented substantial evidence from which a jury could find at least one of the three shots defendant fired was "into" occupied property. Further, substantial evidence showed defendant was located outside the vehicle when he shot. **State v. Mitchell, 246.**

First-degree murder—felony murder—jury charge—committing another felony during murder—The trial court did not err in a first-degree murder case by submitting to the jury the charge of first-degree murder on the theory of committing another felony during the murder as a permissible verdict. The State presented substantial evidence that defendant discharged a firearm into occupied property. **State v. Mitchell, 246.**

HOMICIDE—Continued

First-degree murder—lying in wait—intent—In defendant's trial for first-degree murder, the trial court did not err by instructing the jury on a lying in wait theory of murder. There was sufficient evidence that defendant assaulted the victim after lying in wait, proximately causing his death. There is no requirement that the defendant have intended or expected the victim to die as a result of the assault. **State v. Grullon, 55.**

First-degree murder—merger doctrine—multiple theories of conviction—In defendant's trial resulting in convictions for first-degree murder, attempted robbery, and conspiracy to commit armed robbery, the trial court properly did not arrest judgment on one of defendant's convictions for attempted robbery. Because the jury found defendant guilty of first-degree murder under the theories of both felony murder and lying in wait, felony murder was not the sole theory of first-degree murder and the merger doctrine did not apply. **State v. Grullon, 55.**

First-degree murder—motion to dismiss—sufficiency of evidence—The trial court did not err in a first-degree murder case by failing to dismiss the charge of first-degree murder based upon premeditation and deliberation due to alleged insufficient evidence. The evidence presented by the State was sufficient to withstand defendant's motion. **State v. Mitchell, 246.**

HOSPITALS AND OTHER MEDICAL FACILITIES

Certificate of need—application—look back period—An administrative law judge correctly determined that the North Carolina Department of Health and Human Services' (the Agency) interpretation of the certificate of need law was not entitled to deference with regard to a look back period for providers already in North Carolina. The Agency required that the application include past activities for the 18 months prior to the application, but it only looked at the 18-month period prior to the decision. The Agency is prohibited by N.C.G.S. § 131E-182(b) from requiring an applicant to furnish more than is necessary for it to determine consistency with applicable standards, plans, and criteria, and the record is devoid of any explanation from the Agency for its practice of deviating from the time period in its own application process. **AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs., 92.**

Certificate of need—application criteria—agency interpretation—An administrative law judge's determination in a certificate of need proceeding that The Heritage conformed with the Department of Health and Human Services' (the Agency) Criterion 13(c) was reversed. An agency's interpretation of the statutes it is charged with administering is due deference when its interpretation is reasonable, and the amount of deference given to the agency interpretation depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade. Here, the Agency's method of assessing conformity with Criterion 13(c) was reasonable, based on facts and inferences within the specialized knowledge of the Agency, and therefore entitled to deference. **AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs., 92.**

Certificate of need—application criteria—reasoning behind conclusion—The Court of Appeals could not determine whether an administrative law judge erred by concluding that Liberty's application for a certificate of need was in conformity with the Department of Health and Human Services' Criterion 20. The final decision provided no substantive explanation of how this conclusion was reached and,

HOSPITALS AND OTHER MEDICAL FACILITIES—Continued

indeed, came to logically inconsistent conclusions. **AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs., 92.**

Certificate of need—evidence of quality of care in other facilities—In a certificate of need proceeding, there was no evidence in the record to warrant a finding that an applicant purposely excluded evidence of the quality of care in the applicant's other facilities. **AH N.C. Owner LLC v. N.C. Dep't of Health & Hum. Servs., 92.**

Certificate of need—findings and conclusions—quality of care record—An administrative law judge's (ALJ) failure to make findings and conclusions concerning a certificate of need applicant's actual record of providing care was an error of law, rendering his conclusion of nonconformity arbitrary and capricious. A remand was necessary so that the ALJ could make a substantive determination of whether Britthaven was in conformity with Criterion 20 based on its actual quality of care record. **AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs., 92.**

Certificate of need—geographical scope of review—In a certificate of need case, an administrative law judge correctly concluded that the interpretation of Criterion 20 (geographic scope of application review) by the North Carolina Department of Health and Human Services (the Agency) was not based on a permissible construction of N.C.G.S. § 131E-183(a). The Agency's practice of only examining an applicant's quality of care record within the service area of the proposed project is longstanding and so warrants greater deference, but it must still be a permissible construction of the statute. Here, Agency employees were unable to identify a plausible justification for its past interpretation of the geographic scope element of Criterion 20, and there is no logical basis for disregarding information evidencing quality of care on a state-wide level. Indeed such a policy actually contravenes one of the primary purposes of the certificate of need laws. **AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs., 92.**

Certificate of need—review of existing services—In certificate of need cases, one of the criterion (Criterion 20) to be considered by the North Carolina Department of Health and Human Services ("the Agency") is whether quality health care has been provided in the past by an applicant already involved in the provision of health services. Historically, the Agency has confined its review geographically and temporally. The governing statute, N.C.G.S. § 131E-183(a)(20), does not provide guidance and the Agency's interpretation is entitled to deference if reasonable, but its weight depends on the Agency's thoroughness and "all those factors which give it power to decide." **AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs., 92.**

IMMUNITY

Judicial immunity—appointment of attorney as commissioner overseeing partition of property—quasi-judicial official—The trial court did not err by dismissing plaintiff's complaint on the grounds that defendant real estate attorney had judicial immunity when he was carrying out a partition by sale ordered by the trial court. Defendant, appointed as a commissioner by a clerk of superior court to oversee the partition of property held by co-tenants, was acting within the scope of his duties as a quasi-judicial official. Thus, his actions were covered by the rule of judicial immunity. **Price v. Calder, 190.**

INDICTMENT AND INFORMATION

Injury to real property—victim—legal entity capable of owning property—The indictment charging defendant with injury to real property was invalid on its face because it contained no allegation that the victim, Katy's Great Eats, was a legal entity capable of owning property, and the name of the victim did not otherwise import a corporation or other entity capable of owning property. **State v. Spivey, 264.**

Sex offender's failure to register change of address—indictment sufficient—The indictment charging defendant with violating N.C.G.S. § 14-208.11(a)(2) was sufficient to confer subject matter jurisdiction upon the trial court. While defendant argued that the language of the indictment did not provide that he failed to notify the sheriff's office in writing, defendant's indictment sufficiently alleged that defendant was a person required to register as a sex offender; that he changed his address; and that he failed to notify the appropriate agency within three business days after moving. **State v. Leaks, 573.**

Victim's name misspelled—corrected—The trial court did not err by allowing the State, after resting its case, to correct the name of the victim in the indictment that charged defendant with assault with a deadly weapon from "Christina Gibbs" to "Christian Gibbs." The misspelling appeared inadvertent and did not mislead or surprise defendant as to the nature of the charges against him. **State v. Spivey, 264.**

INSURANCE

Automobile accident—underinsured motorist coverage (UIM)—stacking policies to calculate UIM limits—underinsured highway vehicle—The trial court did not err in a declaratory judgment case determining underinsured motorist (UIM) coverage for a single car automobile accident, involving a grandchild in her grandmother's automobile, by denying plaintiff insurance company's motion for summary judgment and granting summary judgment in favor of defendants. The applicable UIM coverage of the pertinent policies could be stacked in order to calculate the UIM limits and determine if the vehicle was an underinsured highway vehicle. The \$50,000 per person UIM coverage provided by the parents' policy stacked on the \$50,000 UIM coverage provided by the grandmother's policy, for a total of \$100,000 UIM coverage. This amount of UIM coverage was greater than the \$50,000 liability limits of the grandmother's policy. Thus, the grandmother's vehicle was an underinsured highway vehicle for the purposes of the UIM coverage claim. **Integon Nat'l Ins. Co. v. Maurizzio, 38.**

JURISDICTION

Uniform Child Custody Jurisdiction and Enforcement Act—facially valid order from another state—The trial court had jurisdiction to adjudicate the children neglected and dependent even though they were the subject of a prior custody order in New York. Nothing in the Uniform Child Custody Jurisdiction and Enforcement Act required North Carolina's district courts to undertake collateral review of a facially valid order from a sister state before exercising jurisdiction pursuant to N.C.G.S. § 50A-203(1). The New York Court's order was sufficient. **In re N.B., 353.**

JURY

Jury instruction—use of iPads and tablet computers by jurors for notetaking—The trial court did not commit plain error in a first-degree rape and indecent liberties with a child case by giving its jury instruction on the use of iPads and tablet computers after authorizing their use by the jurors for note-taking purposes. **State v. Pace, 63.**

JUVENILES

Psychiatric residential treatment facility—ordered into custody in a second county—jurisdiction—The Court of Appeals' already held in *In re Phillips*, 99 N.C. App. 159 (1990), that where a juvenile is ordered into the custody of one county department of social services and then admitted to a psychiatric residential treatment facility in another county, the district court in the second county has jurisdiction over the admission as long as it does not conflict with the order of the prior court. **In re M.B., 140.**

Readmission to psychiatric treatment facility—sufficiency of evidence—no less restrictive measures available—The district court did not err by concurring in a juvenile's readmission to a psychiatric residential treatment facility (PRTF) based on alleged insufficient findings. There were no sufficient, less restrictive measures available for the juvenile's continued treatment. Further, the district court's order satisfied the requirements of N.C.G.S. § 122C-224.3 by indicating that it incorporated into its factual findings all matters set out in a therapist's court summary, which it in turn relied on for its conclusions that the juvenile was mentally ill, in need of continued treatment at a PRTF, and that less restrictive measures would not be sufficient. **In re M.B., 140.**

LARCENY

Of a motor vehicle—ineffective assistance of counsel—dismissed—On appeal from his conviction for larceny of a motor vehicle, defendant's ineffective assistance of counsel claim was dismissed without prejudice. Ineffective assistance of counsel claims should be asserted through a motion for appropriate relief, which allows development of an adequate factual record to determine the reasonableness of trial counsel's conduct. **State v. Hole, 537.**

Of a motor vehicle—jury instruction—voluntary intoxication—In defendant's trial resulting in his conviction for larceny of a motor vehicle, the trial court did not commit plain error by failing to instruct the jury on the lesser-included offense of unauthorized use of a motor vehicle. Because the trial court properly instructed the jury on the issue of voluntary intoxication, defendant could not show that the jury probably would have reached a different result if it had also received the instruction on unauthorized use of a motor vehicle. **State v. Hole, 537.**

MEDICAL MALPRACTICE

Summary judgment—proximate causation—The trial court did not err by granting summary judgment in favor of defendant doctor in a medical malpractice lawsuit. The affidavits of expert witnesses submitted by plaintiff were insufficient to create a genuine issue of material fact regarding proximate causation because they conflicted with the experts' deposition testimony. As for plaintiff's other argument, the deposition testimony of the expert witnesses was insufficient to create a genuine issue of material fact because none of the experts testified that decedent would

MEDICAL MALPRACTICE—Continued

not or probably would not have died but for the actions of defendant. **Hawkins v. Emergency Med. Physicians of Craven Cnty., PLLC, 337.**

MORTGAGES AND DEEDS OF TRUST

Promissory notes—deficiency—lost rents—no actual possession by mortgagee—no offset—The trial court did not err by granting summary judgment in favor of plaintiff bank regarding deficiency judgments for promissory notes even though defendants sought lost rents during a period when plaintiff did not exercise actual possession of the mortgaged property. Defendants have proffered no evidence that they are entitled to an offset of the judgment amount. **Macon Bank, Inc. v. Gleaner, 46.**

Satisfaction of note—bank no longer the holder—In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, there was no genuine issue of fact that a bank (Mountain 1st) was not the noteholder on 4 June 2010, when a certificate of satisfaction from Mountain 1st was recorded, purporting to cancel the property owners' obligation under a note. HSBC Bank USA, N.A. (HSBC) was subsequently assigned the note and sought the funds from the sale of the property, which had been placed in escrow. The record demonstrated no genuine issue of fact that Mountain 1st was not the note holder when the purported Certificate of Satisfaction was filed on 4 June 2010. **In re Dispute Over Sum of \$375,757.47, 505.**

Satisfaction of note—subsequent to transfer to another bank—In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, a satisfaction executed by a bank was invalid and of no legal effect where the bank had assigned the note prior to the date the satisfaction was executed. **In re Dispute Over Sum of \$375,757.47, 505.**

Satisfaction of note—transfer of note—summary judgement as to holder—In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, the property owner failed to forecast evidence sufficient to overcome the legal presumption and physical fact that HSBC Bank USA, N.A. (HSBC) was the holder of the original promissory note. HSBC presented the original note in open court at the summary judgment hearing and the note was unambiguously indorsed in blank by Wells Fargo. Although the property owners alleged that the note and deed of trust were separate legal contracts and that the note did not incorporate the terms of the deed of trust, they cited no law or authority to support their position. **In re Dispute Over Sum of \$375,757.47, 505.**

Satisfaction of transferred note—attorney fees—In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, the trial court properly awarded attorneys' fees to HSBC Bank USA, N.A. (HSBC). Although the property owners argued that they were not provided the required statutory notice of HSBC's intent to collect attorneys' fees, the uncontroverted evidence showed otherwise. **In re Dispute Over Sum of \$375,757.47, 505.**

Satisfaction of transferred note—escrow funds—In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, the trial court properly ordered escrowed funds from the sale of the property to be paid to HSBC Bank USA, N.A. (HSBC). The deed of trust provided to HSBC, as the last note holder, a security interest in all proceeds from the sale of the real property,

MORTGAGES AND DEEDS OF TRUST—Continued

and the right to collect the balance due under the note. No genuine issue of fact existed to challenge HSBC's note holder status and physical possession of the original note with an unpaid balance. **In re Dispute Over Sum of \$375,757.47, 505.**

MOTOR VEHICLES

Driving while impaired—failure to reduce order—not required to enter written order—The trial court did not err in a driving while impaired case by failing to reduce the order denying defendant's motion to suppress to writing, and by allegedly failing to include specific findings of fact and conclusions of law. If the trial court provides the rationale for its ruling from the bench and there are no material conflicts in the evidence, the court is not required to enter a written order. **State v. Wainwright, 77.**

Driving while impaired—pretrial motion to quash unsigned citation—The trial court did not err by denying defendant's pretrial motion to quash the citation which charged him with driving while impaired even though he did not sign the citation and the officer did not certify the delivery of the citation as mandated by N.C.G.S. § 15A-302(d) (2013). By the plain language of the statute, the officer was only required to sign and date the document if defendant refused to sign. **State v. Wainwright, 77.**

NEGLIGENCE

Explosion at marina—negligence per se—evidence sufficient—In an action arising from an explosion at a marina while a boat was refueling, the trial court did not err by instructing the jury on negligence and negligence per se. While defendant contends it presented sufficient evidence of the negligence of others to support giving the instruction on insulating negligence, the Court of Appeals was unable to find any conduct that superseded the original conduct of defendant where such conduct constituted a violation of a safety statute and proximately caused the death of the victim. **Estate of Coppick v. Hobbs Marina Props., LLC, 324.**

Explosion while fueling a boat—no cumulative error—In an action arising from an explosion and fire at a marina, there was no evidence in the record that the trial court's rulings resulted in confusion of the jury or undue prejudice to defendant such that a new trial was required. **Estate of Coppick v. Hobbs Marina Props., LLC, 324.**

Explosion while fueling boat—negligence per se—The trial court did not err where defendant argued that plaintiff failed to prove the elements of negligence and the trial court denied defendant's motion for judgment notwithstanding the verdict. Where there is a violation of a safety statute, the traditional role of the jury in determining whether a plaintiff has set forth a prima facie case of negligence is superseded, and defendant-violator is considered to be negligent as a matter of law, or negligent per se. In the instant case, the specific activity subject to regulation by the Fire Prevention Code was the use of certain gasoline nozzles containing a hold-open latch at a marina. **Estate of Coppick v. Hobbs Marina Props., LLC, 324.**

Explosion while fueling boat—proximate cause—In an action arising from an explosion at a marina while a boat was refueling, plaintiff put forth sufficient evidence, direct and circumstantial, as to the cause or origin of the explosion. The test of proximate cause is whether the risk of injury, not necessarily in the precise

NEGLIGENCE—Continued

form in which it actually occurs, is within the reasonable foresight of the defendant. Expert testimony is not required to establish the cause or origin. **Estate of Coppick v. Hobbs Marina Props., LLC, 324.**

Jury instructions—intervening negligence—superseding negligence—The trial court did not err in a negligence case by instructing the jury on intervening or superseding negligence. Because the issue was properly submitted to the jury, plaintiff's contention that the lack of evidence of intervening or superseding negligence entitled plaintiff to a directed verdict, to JNOV, or a new trial was also rejected. **Pope v. Bridge Broom, Inc., 365.**

Jury instructions—negligence per se—Manual for Uniform Traffic Control Devices—The trial court did not err by denying plaintiff's request for a jury instruction on negligence per se or by denying his motions for a directed verdict, JNOV, and a new trial based on negligence per se. Even assuming, without deciding, that defendant had a duty to comply with the Manual for Uniform Traffic Control Devices (MUTCD), the portions of the MUTCD that plaintiff suggested were violated did not create specific duties sufficient to be the basis for a claim of negligence per se. Further, because non-mandatory provisions of the MUTCD are optional, they do not provide a duty to be obeyed. While noncompliance with non-mandatory provisions may be relevant to a claim of negligence, such noncompliance does not constitute negligence per se. **Pope v. Bridge Broom, Inc., 365.**

PROBATION AND PAROLE

Probation revocation hearing—held after probation ended—no subject matter jurisdiction—The Court of Appeals vacated the trial court's order revoking defendant's probation because the trial court lacked subject matter jurisdiction. Defendant's offenses were committed prior to 1 December 2009 and his probation revocation hearing was held after 1 December 2009, on 7 January 2014. There was no applicable tolling period, and the trial court's jurisdiction over defendant ended when his sixty-month probationary period ended on or about 17 April 2012. **State v. Sanders, 260.**

Probation revocation hearing—held after probation ended—no subject matter jurisdiction—The Court of Appeals vacated the trial court's order revoking defendant's probation because the trial court lacked subject matter jurisdiction. Defendant's offenses were committed prior to 1 December 2009 and his probation revocation hearing was held after 1 December 2009, on 19 December 2013. There was no applicable tolling period, and the trial court's jurisdiction over defendant ended when his thirty-six month probationary period ended on or about 26 February 2012. **State v. Moore, 461.**

REAL PROPERTY

Property Tax Commission—conflicting evidence—The Property Tax Commission did not err by adopting findings contrary to the record. Both the County and the Taxpayer presented substantial evidence, and the Court of Appeals is not permitted to replace the judgment of the Commission with its own. **In re Appeal of Parkdale Mills, 130.**

Property Tax Commission—remand order—additional hearings—plain language—On remand from the Court of Appeals, the Property Tax Commission did

REAL PROPERTY—Continued

not err by failing to conduct additional hearings. The remand order stated that “the Commission shall conduct additional hearings as necessary and make further findings of fact and conclusions of law.” By its plain language, the order did not mandate that the Commission conduct additional hearings. **In re Appeal of Parkdale Mills, 130.**

ROBBERY

Dangerous weapon—failure to instruct—extortion not a lesser-included offense—The trial court did not commit error, much less plain error, in a robbery with a dangerous weapon case by failing to instruct the jury on the charge of extortion. Defendant’s contention that the crime of extortion was a lesser included offense of armed robbery failed the definitional test adopted by our Supreme Court. **State v. Wright, 270.**

SATELLITE-BASED MONITORING

Supporting evidence—sufficient—The trial court did not err by ordering defendant to be subject to Satellite-Based Monitoring where defendant contended that his prior offenses should not have been considered in the trial court’s findings, but there was evidence in the record to support the remainder of the trial court’s findings with respect to the age of the alleged victims, the temporal proximity of the events, and defendant’s increasing sexual aggressiveness. **State v. Smith, 73.**

SCHOOLS AND EDUCATION

Additional funding—evidence outside scope of proposed budget for pertinent fiscal year not allowed—The trial court erred by allowing plaintiff Union County Board of Education to present evidence of claimed needs outside the scope of plaintiff’s proposed budget for the 2013-2014 fiscal year. N.C.G.S. § 115C-431(c) was never intended to open the door to allow the fact finder to consider evidence outside the scope of the proposed budget and award funding beyond that requested by the board of education, whose duty it is to request sufficient funding to maintain a system of free public schools. **Union Cnty. Bd. of Educ. v. Union Cnty. Bd. of Comm’rs, 274.**

Additional funding—requested instructions—proposed budget—students performing below grade level—The trial court did not err in a case seeking additional school funding to a board of education by failing to issue requested instructions limiting the jury’s consideration to the proposed budget for the 2013-2014 fiscal year. The instructions closely followed the language of N.C.G.S. § 115C-431 and were not overly broad. However, the trial court erred by instructing the jury that students performing below grade level were not obtaining a sound basic education since the instructions likely misled the jury. **Union Cnty. Bd. of Educ. v. Union Cnty. Bd. of Comm’rs, 274.**

Appropriation of funds—legal standard—harmless error—The trial court did not abuse its discretion in a case requesting the appropriation of additional funds to a board of education by allowing plaintiff to argue an alleged improper legal standard in plaintiff’s opening statements. While plaintiff’s argument was technically correct, plaintiff’s statement of the standard to the jury was misleading. However, as a result of the trial court’s instructions and the verdict sheets, defendant was not

SCHOOLS AND EDUCATION—Continued

prejudiced and thus it was harmless error. **Union Cnty. Bd. of Educ. v. Union Cnty. Bd. of Comm'rs, 274.**

Possession of weapon on educational property—jury instruction—knowingly on educational property—The trial court committed plain error by instructing the jury that defendant was guilty of possessing a weapon on educational property even if she did not know she was on educational property. The State bears the burden of proving a defendant's mental state not only for the "possess or carry" element of the statute, but also for the knowing presence on educational property element. **State v. Huckelba, 544.**

SEARCH AND SEIZURE

Motion to suppress evidence—investigatory stop of vehicle—probable cause—The trial court did not err in a driving while impaired case by denying defendant's motion to suppress evidence obtained during an investigatory stop of his vehicle. The officer had probable cause to conduct an investigatory stop. Defendant swerved outside the lane of travel and almost struck the curb at 2:37 a.m. in an area with heavy pedestrian traffic and within close proximity to bars and nightclubs. **State v. Wainwright, 77.**

Open container offense—search for additional evidence related to violations—In defendant's appeal of the trial court's order denying his motion to suppress, the Court of Appeals rejected his argument that the search of his vehicle's center console was not justified as a search incident to arrest. Even though the officer had enough evidence to prosecute defendant for open container violations, he had a reasonable belief that evidence related to the violations might be found in defendant's center console. **State v. Fizovic, 448.**

Open container offense—search incident to arrest—before arrest—In defendant's appeal of the trial court's order denying his motion to suppress, the Court of Appeals rejected his argument that the search of his vehicle's console should be treated as a search incident to citation because the officer only intended to give him a citation and he had not yet been arrested. At the time of the search, the officer had probable cause to arrest defendant for open container violations, which allowed the search to be justified as incident to arrest. **State v. Fizovic, 448.**

Open container offense—search incident to citation—In defendant's appeal of the trial court's order denying his motion to suppress, the Court of Appeals rejected his argument that the search of his vehicle's center console was an impermissible search incident to citation. Defendant never was issued a citation, and he was arrested for the open container offenses for which he was stopped. **State v. Fizovic, 448.**

Reasonable expectation of privacy—digital contents of stolen GPS device—The Court of Appeals reversed and remanded the trial court's order granting in part defendant's motion to suppress evidence obtained from a search of the digital contents of a stolen GPS device found on his person. The trial court was instructed to make findings of fact regarding the manner in which defendant obtained the stolen device to determine whether he had a reasonable expectation of privacy in its digital contents. **State v. Clyburn, 428.**

Search incident to arrest—digital contents of GPS device—not justified—In its order granting defendant's motion to suppress, the trial court properly concluded

SEARCH AND SEIZURE—Continued

that a search of the digital contents of a GPS device found on defendant's person was not justified as a search incident to arrest. An individual's privacy interests in the digital contents of a GPS device are great, and a search of such a device does not further the government's interests in officer safety or the preservation of evidence. **State v. Clyburn, 428.**

SENTENCING

Aggravated sentence—remanded for resentencing—The trial court erred in a first-degree rape and indecent liberties with a child case by sentencing defendant to an aggravated sentence. The case was remanded to the trial court for resentencing with instructions to conduct further proceedings. **State v. Pace, 63.**

Life imprisonment without parole—minor—first-degree murder—mitigating circumstances—findings—A sentence of life imprisonment without parole for a minor convicted of first-degree murder was remanded where the conviction was not based solely on felony murder and the trial court's order made cursory, but adequate findings as to the mitigating circumstances set forth in N.C.G.S. § 15A-1340.19B(c) (1), (4), (5), and (6) but did not address factors (2), (3), (7), or (8). Factor (8), the likelihood of whether a defendant would benefit from rehabilitation in confinement, is a significant factor in the determination of whether the sentence of life imprisonment should be with or without parole. Also, portions of the trial court's findings of fact were more recitations of testimony rather than evidentiary or ultimate findings of fact. Finally, if there is no evidence presented as to a particular mitigating factor, then the order should so state, and note that as a result, that factor was not considered. **State v. Antone, 408.**

Prior record level—AOC report—identification of defendant—The trial court correctly determined that a defendant who plead guilty had six prior record points and was a felony record level III. Defendant received precisely the sentences for which he bargained, which were from the presumptive range of sentences for a defendant at felony sentencing level III. Defendant contended that he should have been sentenced at Level II because the State did not prove that one of the prior convictions was his. Although the birthdate on the AOC report was incorrect and the address was not defendant's address at the time of sentencing, it is not unusual for a person to have lived at a different address fourteen years earlier, and the discrepancy in the date of defendant's birth was not determinative. It is the role of the trial court to weigh the evidence, and the appellate court is bound by the trial court's determinations if supported by evidence in the record. **State v. Sturdivant, 480.**

Sex offender's failure to register change of address—variance between written judgment and announcement in defendant's presence—The trial court violated defendant's right to be present during sentencing by entering a written judgment imposing a longer prison term than that which the trial court had announced in defendant's presence during the sentencing hearing. There was no indication in the record that defendant was present at the time the written judgment was entered. **State v. Leaks, 573.**

SEXUAL OFFENDERS

Failure to register—failure to return verification form—motion to dismiss—insufficient evidence of receipt of verification form—The trial court erred by

SEXUAL OFFENDERS—Continued

denying defendant's motion to dismiss for insufficient evidence that he actually received the verification form underlying his conviction of failure to register as a sex offender due to his failure to return the verification form. The judgments were vacated. **State v. Moore, 465.**

STATUTES OF LIMITATION AND REPOSE

Foreclosure—ten years—failure to exercise acceleration clauses—power of sale on due date of final payments—The trial court did not err by concluding that the statute of limitations did not bar foreclosure of the pertinent two notes. The trial court correctly applied N.C.G.S. § 1-47(3), finding that it was the later of the provisions contained in the statute that triggered the accrual of the statute of limitations. Since the note holder elected not to exercise either of the notes' acceleration clauses, the power of sale did not become absolute until the date that the final payments were due. Since foreclosure proceedings were initiated in 2012, well within the ten-year statute of limitations, N.C.G.S. § 1-47(3) did not bar the foreclosure action on either Note 1 or Note 2. **In re Foreclosure of Brown, 518.**

TERMINATION OF PARENTAL RIGHTS

Abandonment—last-minute payments—last-minute requests for visitation—The trial court did not err in a termination of parental rights case by concluding that respondent had abandoned the juvenile. The trial court found that, during the relevant six-month period, respondent did not visit the juvenile, failed to pay child support in a timely and consistent manner, and failed to make a good faith effort to maintain or reestablish a relationship with the juvenile. Respondent's last-minute child support payments and requests for visitation did not undermine the conclusion that respondent had abandoned the juvenile. **In re C.J.H., 489.**

Abandonment—presents and cards—no prejudicial error—In a termination of parental rights hearing, there was no prejudicial error where the trial court erred by finding that respondent failed to send birthday and Christmas presents or cards in 2014, considering the discussion elsewhere in the opinion. **In re C.J.H., 489.**

Abandonment—requests for visitation—good faith—timeliness—Clear, cogent, and convincing evidence in a termination of parental rights case supported the trial court's conclusion that respondent had failed to make a good faith effort to visit the child. The trial court examined respondent's history of sporadic contact with the juvenile in evaluating whether his 2014 requests for visitation were made in good faith and, although the trial court must examine the relevant six-month period in determining whether respondent abandoned the juvenile, the trial court may consider respondent's conduct outside this window in evaluating respondent's credibility and intentions. **In re C.J.H., 489.**

Abandonment—some support payments made—The trial court's findings of fact in a termination of parental rights case were sufficient to support at least one ground for termination, abandonment, pursuant to N.C.G.S. § 7B-1111(a)(7). The fact that respondent made some child support payments during the relevant six-month period did not undermine the trial court's findings that respondent did not voluntarily provide financial support for the juvenile before entry of a Tennessee child support order and that he failed to provide timely, consistent child support since the entry of that order. **In re C.J.H., 489.**

TERMINATION OF PARENTAL RIGHTS—Continued

Hearing—respondent not present initially—notice of arrival next day—allowing witness to finish testimony—In a termination of parental rights case where respondent was not present for the hearing initially but called and said he would appear the next day, the trial court did not abuse its discretion in allowing the petitioner to finish the direct examination of her witnesses, given the trial court's finding that respondent knew the correct date of the hearing, that respondent's counsel was present during the entire hearing, and that respondent was present the next day when any cross-examination would have occurred. **In re C.J.H., 489.**

Motion to continue hearing—denial not abuse of discretion—In an action to terminate a father's parental rights, the trial court did not abuse its discretion by initially denying respondent's motion to continue because respondent had not demonstrated any "extraordinary circumstances" that necessitated a continuance. At the beginning of the 9 July 2014 hearing, more than 90 days after the petition was filed, respondent's counsel moved to continue the hearing due to respondent's absence. After hearing arguments from both respondent and petitioner, the trial court denied the motion. Although respondent argued that the trial court erred because the case had not been previously continued and there was no indication that an additional week or two would have prejudiced either party, respondent bore the burden of demonstrating sufficient grounds for continuance and petitioner had no burden to show lack of prejudice. **In re C.J.H., 489.**

Subject matter jurisdiction—verification of petition—The Court of Appeals vacated an order terminating respondent father's parental rights because the trial court lacked subject matter jurisdiction to enter the order. The petition alleging the juvenile neglected was not properly verified, so the trial court did not obtain subject matter jurisdiction over the matter and Wake County Human Services did not have standing to file the motion to terminate parental rights. **In re N.T., 33.**

UTILITIES

Telephone pole attachment—cable provider—rates not just and reasonable—The Business Court did not err in its findings of fact and conclusion of law that the rates Rutherford Electric Membership Corporation (Rutherford) charged TWEAN (a cable service provider) between 2010 and 2013 for use of utility poles were not just and reasonable under N.C.G.S. § 62-350. Rutherford did not specifically challenge any of the order and opinion's factual findings, but instead contended that the Business Court misapprehended the General Assembly's intent in enacting N.C.G.S. § 62-350, leading to an absurd result. Rutherford offered several arguments in support of its position, none of which had merit. These involved use of the FCC Cable Rate, the effect of Rutherford's uniform class-based rates, the state law presumptions to which Rutherford referred, and Rutherford's failure to present any competent evidence that its rates were just and reasonable. **Rutherford Elec. Membership Corp. v. Time Warner Entm't, 199.**

Telephone pole attachment—negotiation of rates—The Business Court did not err by concluding that Rutherford Electric Membership Corporation violated N.C.G.S. § 62-350 when it unilaterally raised the pole attachment rates of TWEAN (a cable service provider) without negotiation. The plain language of N.C.G.S. § 62-350 requires a utility pole owner to allow CSPs to attach to their poles at just, reasonable, and nondiscriminatory rates, terms, and conditions adopted pursuant to negotiated or adjudicated agreements. **Rutherford Elec. Membership Corp. v. Time Warner Entm't, 199.**

VENUE

Specified in non-compete agreement—statutorily required to be in county of residence—The trial court did not err in denying defendant's motion to dismiss for improper venue where plaintiff brought an action to enforce a non-compete agreement which specified venue. A forum selection clause which requires lawsuits to be prosecuted in a certain North Carolina county is enforceable only if the legislature has provided that said North Carolina county is a proper venue. The legislature has provided that this contract dispute must be tried in the county in which the plaintiff or defendant resides, but there is nothing in the record which shows that either party is a resident of Mecklenburg County for venue purposes. **A & D Envtl. Servs., Inc. v. Miller, 296.**

WORKERS' COMPENSATION

Claim denied—findings supported by competent evidence—In plaintiff's appeal from the Opinion and Award of the full Industrial Commission denying his claim for Workers' Compensation benefits, the Court of Appeals affirmed the Commission, holding that the challenged findings of facts were supported by competent evidence; any reliance on incompetent evidence was not prejudicial; the evidence was not weighed improperly; and the Deputy Commissioner's findings of fact were not binding on the full Commission. **Lowe v. Branson Auto., 523.**

Interstate trucking company—not exempt from workers' liability—A trucking company and an individual were not exempt from liability for not carrying workers' compensation insurance where they argued that the statute mentioned contractors and subcontractors but not employers. **Atiapo v. Goree Logistics, Inc., 1.**

Temporary total disability—failure to meet burden—expert testimony—inability to find any other work—The Industrial Commission erred in a workers' compensation case by awarding plaintiff employee temporary total disability (TTD) benefits. Plaintiff did not meet his burden to show that he was entitled to TTD compensation. Because plaintiff failed to provide competent evidence through expert testimony of his inability to find any other work as a result of his work-related injury, the opinion and award was reversed. **Fields v. H&E Equip. Servs., LLC, 483.**

Transportation broker—no federal preemption—Owen Thomas, a transportation broker, was not exempt from a state workers' compensation provision due to federal preemption. There is no reason why a statute requiring financial responsibility as to workers' compensation should be considered a regulation of prices, routes, or services and the federal preemption established in 49 U.S.C. § 14501(c)(1) does not apply to N.C.G.S. § 97-19.1, which imposes liability upon those who employ persons or entities that fail to procure required workers' compensation insurance. **Atiapo v. Goree Logistics, Inc., 1.**

Transportation broker—trucking company without insurance—broker liable—The Industrial Commission had jurisdiction over Owen Thomas, Inc., a transportation broker, in a workers' compensation case where Sunny Ridge paid Owen Thomas to deliver its goods, Owen Thomas then hired Goree Logistics to perform the delivery, the injured driver worked for Goree, and Goree did not have workers' compensation insurance. **Atiapo v. Goree Logistics, Inc., 1.**

